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No. _____

In The

Supreme Court of the United States

October Term, 1995

CRIST ELLIS AND NORMA WONG-LARKIN,

Petitioners,

v.

UNITED AIRLINES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify the split in the Circuits of whether the disparate impact proof theory available to other victims of discrimination is available to a plaintiff in an Age Discrimination in Employment Act ("ADEA") case.

2. Certiorari should be granted to clarify the burden of proof in a case under the Airline Deregulation Act where an employer uses criteria which defeats the purpose of the Act and excludes older flight attendants.

PARTIES TO THE PROCEEDING

Petitioners, Crist Ellis and Norma Wong-Larkin, are residents of the State of Colorado. They were the Plaintiffs in the lower court proceedings of this case and were the Appellants before the United States Court of Appeals for the Tenth Circuit.

Respondent, United Air Lines, Inc., is a corporation, existing by the virtue of the laws of the State of Delaware. Respondent does business within the State of Colorado and was a Defendant to the action in the lower court proceedings. Respondent was also an Appellee before the United States Court of Appeals for the Tenth Circuit. Its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates consist of UAL Corporation, Mileage Plus, Inc., U-C Corp., Air Wis Services, Inc., Covia Corporation, Cypher Corporation, E & T Trading Corporation, United Airlines Credit Corporation, United Airlines Galileo Holding Company, United Aviation Fuels Corporation, United Cogen, Inc., United Worldwide Corporation, and United Vacations, Inc. Covia Corporation owns 50% equity interest in Covia Partnership, a Delaware general partnership. Covia Corporation also owns 25.6% interest in the Galileo Company Limited, a United Kingdom company.

There are no other parties to this action.

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PETITION FOR A WRIT OF CERTIORARI

Crist Ellis and Norma Wong-Larkin hereby petition this Court for issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 4, 1996.

OPINIONS BELOW

On January 4, 1996, the United States Court of Appeals for the Tenth Circuit issued its opinion, affirming the decision of the District Court. The Opinion is found at 73 F.3d 999 (10th Cir. 1996) and is reprinted in the Appendix ("APP") at page 1A[1]. The opinion of the district court is unreported, and is reprinted in the Appendix at page 33A.

STATEMENT OF JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered on January 4, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 9, 1996. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

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[1] Citations to material printed in annexed appendix appear as "___a".

STATUTES INVOLVED

1. The Age Discrimination in Employment Act ("ADEA"), codified as amended at 29 U.S.C. §§ 621-34.

2. The Airline Deregulation Act ("ADA") codified as amended at 49 U.S.C. §§ 42101-03 (formerly codified at 49 U.S.C. §§ 1552) (1988).

STATEMENT OF THE CASE

Both female Petitioners were formerly employed as flight attendants by Frontier Airlines, Inc., ("Frontier") with seniority dates dating back to 1970 (Wong-Larkin) and 1972 (Ellis). Petitioners lost their jobs as a result of Frontier's bankruptcy on August 26, 1986. In 1986, both Petitioners applied for employment as flight attendants with United Airlines. Petitioners, Crist Ellis and Norma Wong-Larkin, asserted claims under Age Discrimination in Employment Act ("ADEA") and the Airline Deregulation Act, (ADA) 49 U.S.C. Section 1552.

In the proceeding before the district court, Petitioners attempted to prove age discrimination under both a disparate treatment theory as well as a disparate impact theory of discrimination.

With respect to Petitioners' claims under the Airlines Deregulation Act ("ADA"), when Frontier Airlines ceased operations due to bankruptcy, Petitioners became "protected employees" entitled to exercise first hire rights under the Airline Deregulation Act, 15 U.S.C. App. § 1551 ("ADA"). Petitioners asserted that if a carrier uses job

qualifications which have the effect of excluding "protected employees," the carrier bears the burden of proving that the criteria is job-related.

United had a "dual" weight policy. It required older applicants to weigh less than similarly situated incumbent flight attendants. Therefore when applying for a job a 40 year old flight attendant must weigh the same as a 20 year old. Yet, the day *after* hire the 40 year old is given an "age allowance" and can weigh more.

Thus, United Airlines has acknowledged that older flight attendants weigh more and can still perform the job at the higher weight. Yet, in order to be hired, she must weigh what a 20 year old weighs. This artificially makes a younger pool since 40 year old flight attendant applicants will be excluded from consideration if she weighs an amount covered by the United Airlines' "age allowance."

Both Petitioners demonstrated their weights were within the weight amounts for flight attendants already working at United who were their age, yet they were excluded because they didn't weigh what a 20 year old flight attendant was required to weigh to be hired.

The district court granted summary judgment on all claims. The Tenth Circuit, in its Opinion on January 4, 1995, affirmed the district court and ruled that "ADEA claims cannot be based on a disparate impact theory of discrimination."

The Tenth Circuit further ruled, with respect to the ADA claim, that:

> " . . . we do not believe the ADA permits us to second-guess the business judgment of

employers any more than does the ADEA. An air carrier may require an applicant to meet "any prerequisites of qualifications" except initial hiring age, 29 C.F.R. §§ 220.20 (a) & 220.21 (a)(1) (emphasis added), and other criteria not here involved, and, as explained above, Plaintiffs have not shown that United's use of weight standards was pretextual."

REASONS FOR GRANTING WRIT

This case presents questions of fundamental importance under federal law affecting the entire framework for how all ADEA cases must be tried. This ruling forecloses an avenue of proof to ADEA plaintiffs in pursuing their claims. Congress did not so limit ADEA plaintiffs, yet, the Tenth Circuit has, contrary to the holdings in other circuits.

I. This Court's intervention is necessary to resolve a split in the circuits concerning an issue which has a significant impact on the federal policies embodied in the Age Discrimination In Employment Act ("ADEA") and has been the subject of much recent litigation.

A. The decision below conflicts with decisions of other Circuit Courts of Appeals.

The question involving whether a disparate impact claim can be brought under the ADEA has never been decided by the United States Supreme Court. See, *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993). The issue of whether the disparate impact theory is available as a

method of proof to victims of age discrimination is of major legal significance. Most importantly, the Circuit Courts are split and awaiting a resolution from this Court of this issue.

The Tenth Circuit's opinion, at page 24, states, " . . . of those courts that have considered the issue since *Hazen*, there is a clear trend toward concluding that the ADEA does not support a disparate impact claim". The Tenth Circuit cites *DiBiase v. Smithkline Beecham Corp.*, 48 F. 3d 719, 732-34 (3rd Cir. 1995). The Tenth Circuit specifically states that *DiBiase* holds, "that there is no disparate impact claim under the ADEA". This is a clearly erroneous interpretation since the *DiBiase* court did not so rule. The *DiBiase* court issued separate opinions on this issue. Two of the three judges found that the case didn't lend itself to a disparate impact analysis.

In the *Dibiase* case, Judge Greenberg then wrote that,

> " . . . and in fact, we recently recognized that the existence of disparate impact theory under the ADEA is an open question . . . " Id. 732.
>
> * * *
>
> "**But I need not go so far as to say that disparate impact theory is never available under the ADEA. Rather, resolution of that issue must await another day**. I write this section to highlight my doubts and to say that, at any rate, disparate impact theory should not be applied as a matter of course. Here, of course, we only need hold that even if in some situations disparate impact liability may be established under the ADEA, this case does not present one of them." Id. at 734. (Emphasis added).

The Tenth Circuit also indicated that *Lyon v. Ohio Educ. Assn. & Professional Staff Union*, 53 F. 3d 135, 138-39 (6th Cir. 1995), held the "***same***" as *DiBiase*. This is clearly erroneous. Consider the following language from *Lyon:*

> "Plaintiffs have conceded that "[t]his is not a disparate impact case since Option B, as administered by Defendants-Appellants [sic] is not age neutral," and we shall take them at their word." Id. 137-138.

In fact, the *Lyon* court, in footnote 5, states the exact opposite of what the Tenth Circuit asserts. Footnote 5 states:

> " . . . However, this circuit has stated that a disparate-impact theory of age discrimination may be possible. See, *Abbott v. Federal Forge*, 912 F.2d 867 (6th Cir. 1990)."

It is apparent that the Tenth Circuit has misinterpreted the provisions of the ADEA. It is equally apparent that the Circuit Courts are split on this issue and the point is at hand where this Court must unify the Circuit Courts on this issue. The Tenth Circuit in this case and the Seventh Circuit's decision in *EEOC v. Francis W. Parker School*, 41 F. 3d 1073 (7th Cir. 1994) are clearly in conflict with decisions from the Second, Eighth, and Ninth Circuits. See, *Geller v. Markham*, 635 F.2d 1027, 1032-1034 (2d Cir. 1980, cert. denied, 451 U.S. 945 (1981); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690-92 (8th Cir. 1983); *Houghton v. Sipco, Inc.*, 38 F. 3d 953, 958-959 (8th Cir. 1994); *EEOC v. Borden's Inc.*, 724 F. 2d 1390, 1394-95 (9th Cir. 1984) and *EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992).

B. The decision below presents important issues of Federal law

These issues are important issues of federal law. They exemplify the problem of a split in the Circuits when, in some Circuits an entire theory of proof is availiable to an ADEA plaintiff whereas, in the Tenth Circuit it is not. This is a statute designed and created to protect older workers from invideous discrimination. Yet, in the Tenth Circuit, these rights have been dramatically and drastically curtailed.

C. The decision below has far reaching effect and controls the course of ADEA litigation for the Tenth Circuit impacting many parties.

Age discrimination for all parties in the Tenth Circuit has been impacted by this ruling. The entire framework upon which an age claim can be brought is affected. This case impacts not just these two petitioners but every single plaintiff and defendant in every age case that will ever be brought in the Tenth Circuit.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE BURDEN OF PROOF IN A CASE UNDER THE AIRLINE DEREGULATION ACT ("ADA") WHERE AN EMPLOYER USES CRITERIA WHICH ARGUABLY DEFEATS THE PURPOSE OF THE ADA AND EXCLUDES OLDER FLIGHT ATTENDANTS.

"When Congress deregulated the airline industry in the late 1970s, it sought to soften the blow to longtime airline employees who might lose their jobs in the

expected industry shake-up. It therefore included in the deregulatory legislation an Employee Protection Program ("EPP") for experienced airline workers who lost jobs or income as the result of a covered carrier's bankruptcy or downsizing . . . Among other things, the EPP gives a furloughed or terminated employee with four years' experience as of October 1978 a 'first right of hire', regardless of age, in his occupational specialty, by any other air carrier hiring additional employees . . . ". See, *Crocker v. Piedmont Aviation Inc.*, 49 F.3d 735, 737 (C.A. D.C. 1995). "'A first-hire action under the Airline Deregulation Act 'is not, at its core, an anti-discrimination suit'." See, *Bowdry et al v. United Airlines, Inc.*, 58 F. 3d 1483, 1489 (10th Cir. 1995) (Citing *Crocker v. Piedmont Aviation, Inc., supra).*

With respect to the ADA claim, the Tenth Circuit ruled, "As a general matter, weight requirements are permissible job-related criteria for flight attendants." This is not in dispute. An employer can use any non-discriminatory criteria it so chooses. However, that criteria cannot defeat the purpose of the ADA. Based upon the Department of Labor's interpretation of § 220.21(a) there are questions of fact for the jury concerning whether United's dual weight policy is directly job related and whether the non-job related qualification "defeats the purpose of the Act." Here, since older, heavier flight attendants are on the job and performing the job, United simply cannot justify refusing to hire older people of the exact same weight, who could otherwise do the job.

The Tenth Circuit stated, "we do not believe that United's use of weight standards defeated the purpose of the ADA . . . " At page 28. This is a question of fact to be

decided by the jury which is sufficient to avoid summary judgment.

The Tenth Circuit reasoned, at page 27, that:

> "Plaintiffs have not shown that United's use of weight standards was pretexual."

The Tenth Circuit's reasoning is erroneous. The ADA was enacted to provide a first right of hire for "protected employees" without the hindrance of job requirements which defeat the purpose of the Act.

In a Title VII case, a plaintiff must show not only that a defendant's articulated reason is a pretext, but must show that it is a pretext for discrimination. See, *EEOC v. Flasher Co., Inc.* 986 F. 3d 1312 (10th Cir. 1992). Petitioners proved that individuals whose weight was identical to theirs were *actually performing* the job.

Under the ADA, it is the employer's burden to show that a job requirement which excludes protected employees is job related. United has never argued that its weight requirement was job related. United only argues that it has a dual weight system as a result of the union contract.

This Tenth Circuit's reasoning that "[P]laintiffs have also failed to introduce any evidence that the weight standards acted generally to frustrate the first hire rights of designated employees by preventing them from getting hired" (Opinion at page 27) makes no sense. Petitioners produced evidence that United was aware that both these individuals were protected employees. Petitioners produced evidence that other flight attendants in United's workforce with identical height-weight ratios

were allowed to weigh what Petitioners weighed if they were employed and were performing the job. Petitioners produced evidence that United's requirement that these older women must meet the height-weight requirement of 20 year olds, frustrated the purpose of the ADA. In short, Petitioners produced evidence from which a reasonable fact-finder could have concluded that under the ADA United's height-weight requirement "defeats the purpose of the Act" and was designed to deny "protected employees" their first right of hire.

The Tenth Circuit imposed an illusory burden upon the Petitioners. They required that Petitioners prove that a legitimate job qualification was pretextual under Title VII for ADA liability to attach. In a Title VII discrimination case the pretext must be illegal discrimination. In an ADA case the pretext must frustrate the purpose of the ADA. In the case at bar, Petitioners clearly proved that the height-weight requirement, legitimate or not, bore no relationship to Petitioners' ability to perform the job and frustrated the purpose of the ADA.

CONCLUSION

The Tenth Circuit misread the holdings of both *DiBiase* and *Lyon*. Contrary to this Tenth Circuit's ruling, the 3rd Circuit and the 6th Circuit have not ruled that "there is no disparate impact claim under the ADEA. This is an issue of exceptional importance and should be given consideration by the full Court based on the above stated reasons. The Tenth Circuit has gutted the ADEA based upon a misinterpretation of rulings from other circuits. It

has by that action universally denied rights to legitimate victims under the ADEA.

With respect to the Airlines Deregulation Act, The Tenth Circuit held that for "protected employees" to prevail under the ADA the Petitioners must demonstrate pretext. Petitioners believe this is incorrect.

Under the ADA, Petitioners need only show that the requirements "frustrate the purpose of the Act". The weight requirement imposed upon the Petitioners was purely cosmetic. There was absolutely no correlation to the weight and the job since incumbent employees were allowed to weigh exactly what Petitioners weighed and those employees were performing the job. Here, these requirements which disappear the day after hire are clearly requirements that "frustrate the purpose of the Act". There were clearly factual issues in dispute. Summary judgment should have been denied.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CRIST ELLIS and NORMA WONG-LARKIN, Plaintiffs-Appellants, v. UNITED AIRLINES, INC., a Delaware corporation, Defendant-Appellee.	No. 94-1351
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus Curiae.	
CRIST ELLIS and NORMA WONG-LARKIN, Plaintiffs-Appellants, v. UNITED AIRLINES, INC., a Delaware corporation, Defendant-Appellee.	No. 95-1034

Appeals from the United States District Court
for the District of Colorado
(D.C. No. 90-S-1085)

(Filed Jan 4, 1996)

John Mosby, Denver, Colorado (Elisa Moran, Denver, Colorado with him on the briefs) for Plaintiffs-Appellants.

Kris J. Kostolansky (Michael D. Nosler and Susan L. Strebel with him on the briefs) of Rothgerber, Appel, Powers & Johnson, Denver, Colorado for Defendant-Appellee.

Paul D. Ramshaw (James R. Neely, Jr., Gwendolyn Young Reams, and Vincent J. Blackwood with him on the brief) for Amicus Curiae.

Before **EBEL** and **MCKAY**, Circuit Judges, and **COOK**,* District Judge.

EBEL, Circuit Judge.

Plaintiffs Crist Ellis ("Ellis") and Norma Wong-Larkin ("Wong-Larkin") filed this action against United Air Lines, Inc. ("United") after United refused to hire them as flight attendants when they applied for positions following the bankruptcy of their former employer Frontier Airlines ("Frontier"). Plaintiffs contended that United's refusal to hire them violated (1) the Age Discrimination in Employment Act ("ADEA"), codified as amended at 29 U.S.C. §§ 621-34; and (2) the Airline Deregulation Act ("ADA"), codified as amended at 49 U.S.C. § 42101-03 (formerly codified at 49 U.S.C. App. § 1552). United stated that it rejected Plaintiffs' applications because Plaintiffs failed to meet United's weight requirements for

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* The Honorable H. Dale Cook, Senior District Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

new flight attendant hires. In response, Plaintiffs argued that United's explanation was a pretext for intentional discrimination against them because of their age, in violation of the ADEA. Plaintiffs also argued that, even if United did not intentionally discriminate against them because of age, United's age-neutral weight requirements disparately impacted them because of their age, in contravention of the ADEA. Plaintiffs further claim that the weight requirements, whether discriminatory or not, cannot excuse United's failure to grant Plaintiffs the preferential hiring treatment to which they were entitled under the ADA as airline employees displaced by deregulation.

The district court granted summary judgment for United on Plaintiffs' ADEA and ADA claims, and then denied Plaintiffs' motion for the payment of certain expenses associated with United's deposition of plaintiffs' expert witness. Plaintiffs appeal both rulings, and we affirm. We reject Plaintiffs' ADEA claim because Plaintiffs have failed to submit evidence raising a genuine dispute that United's explanation for not hiring them is pretextual, and because we hold that ADEA claims cannot be based on a disparate impact theory of discrimination. Plaintiffs' ADA claim fails because, once again, Plaintiffs failed to produce evidence raising a genuine dispute that United's explanation for not hiring them is pretextual. Finally, we conclude that the district court did not abuse its discretion in ruling that Plaintiffs are not entitled to the payment of further expert witness fees because their motion for such fees was untimely.

I. BACKGROUND

Ellis and Wong-Larkin worked as flight attendants for Frontier from 1972 and 1970 respectively until they lost their jobs as a result of Frontier's bankruptcy in August 1986. Following Frontier's demise, they applied for flight attendant positions with United on several occasions, but United refused to hire them because they both allegedly failed to meet its weight standards for new flight attendant hires.

United employs two different weight standards for its flight attendants. One standard sets weight limits which must initially be met by new job applicants and the second standard establishes maximum weight limits that cannot be exceeded by flight attendants after they are hired. Both standards specify maximum weights according to height. The standard applied to initial job applicants disregards age entirely, while the weight standard for employees makes allowances for weight gain according to age. United argues that the standard for employees, which allows for some weight gain with age, was a product of its collective bargaining agreement with the flight attendant union.

The following weight chart applied to Plaintiffs as initial job applicants:

Height	Maximum Weight
5'4"	132
5'4¼"	133
5'4½"	134
* * *	
5'6"	139
5'6¼"	140
5'6½"	141

Had Plaintiffs been hired, they would then have had to keep their weight below the following limits in order to maintain their jobs as flight attendants:

Height	Maximum Weight Age 34 & younger	35-44	45-54	55 & older
5'4"	134	137	140	143
5'4-1/4"	135	138	141	144
5'4-1/2"	136	139	142	145
	*	*	*	
5'6"	141	144	147	150
5'6-1/4"	142	145	148	151
5'6-1/2"	143	146	149	152

As the charts reveal, the height/weight requirements for all new job applicants are the same regardless of the applicant's age, while a nine-pound differential exists between the maximum weights for the youngest and oldest employed female flight attendants of a given height. Thus, new job applicants could fail to satisfy the age-neutral weight requirements used for hiring and yet still be within the weight requirement for existing employees of their same age.

Ellis first applied for a flight attendant position at United in August 1986. Ellis is 5'4½" tall and was 40 years old when she first applied. Therefore, pursuant to United's initial hiring requirements, Ellis could weigh no more than a maximum of 134 pounds. United rejected Ellis' application, stating that she failed to meet its weight requirements and informing her that "[y]our weight history over the past twelve months suggests you would be unable to maintain your weight within our

standards." United, however, invited her to apply for other positions that did not have a weight requirement. Unfortunately, no records remain of Ellis' actual weight at that time; however, Ellis has introduced no evidence challenging or denying United's conclusion that she exceeded its weight limits for flight attendant applicants.

Ellis applied a second time on February 4, 1987. She listed her weight as 120 pounds and stated that the heaviest she weighed in the last twelve months was 122 pounds. Based on that application, as updated in September 1988, United interviewed Ellis on December 14, 1988. At that time, United recorded Ellis' weight as 139 pounds, five pounds over the maximum allowable weight for new job applicants.[1] United noted that she was overweight and then sent Ellis a letter stating that it had hired more qualified candidates. Ellis applied a final time in September 1990, and United again refused to hire her. The record before us does not contain any information about Ellis' weight at that time, but, again, Ellis introduced no evidence that she met United's weight requirements at that time.

Wong-Larkin first applied for a flight attendant position at United in September 1986 when she was 38. Some dispute exists concerning Wong-Larkin's height. Plaintiffs maintain that she is 5'6½" tall, as stated on her resume, and as listed in some of her applications described below. United contends that she is 5'6", as it recorded after her

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[1] Plaintiffs note that United misrecorded Ellis' height as 5'3¼", Appellant App. at 78, but do not base any part of their claim on that mistake.

September 1986 application and as she stated in a deposition. At 5'6", Wong-Larkin could weigh no more than 139 pounds as an applicant for a flight attendant position. At 5'6½", she could weigh 141 pounds as an applicant for a flight attendant position.

In any event, United interviewed Wong-Larkin following her September 1986 application. No record remains of her weight at that time; however, Wong-Larkin recalled that United recorded her height as 5'6" and she agreed that was her height. She felt at the time that she weighed about 142 pounds because that is what she weighed at Frontier in January 1986. United asserted that it did not hire her because of her weight, although she contends that United never articulated a reason for not hiring her until this litigation arose.

Wong-Larkin applied again on August 29, 1988, at the age of 40, listing her height as 5'6½" and her weight as 135 pounds on her application. At a subsequent interview on January 14, 1989, she listed her height as 5'6½" and her weight as 140 pounds. United argues that she was not hired because of her weight. However, once, again, no evidence exists in the record before us of her actual weight at the time. Wong-Larkin states that she received no reply from United at the time and was told that no record existed of her application when she attempted to inquire as to the status of her application. Finally, Wong-Larkin applied on January 31, 1990, listing her height as 5'6½" and her weight as 150 pounds. The record before us does not contain any information on the disposition of this application; however, United explains, and Plaintiffs do not dispute, that United again denied

her application at least purportedly because of her weight.

Based on these events, Plaintiffs filed suit against United, claiming that United (1) discriminated against them in violation of the ADEA; and (2) denied them preferential hiring treatment, as required by the ADA for employees displaced by deregulation of the airline industry.[2] In a related action, United moved for summary judgment against different plaintiffs on their ADA claims in that case, arguing that those plaintiffs had waived their first-hire rights and were barred from raising certain of their claims by the statute of limitations. The district court granted the motion and then, for substantially the same reasons, also granted summary judgment for United in the instant case. Pending appeal, the court stayed consideration of Plaintiffs' ADEA claim. We reversed the district court's ruling as to the ADA in the related case of *Bowdry v. United Air Lines. Inc.*, 956 F.2d 999 (10th Cir.), *cert. denied*, 113 S. Ct. 97 (1992), and the court reinstated Plaintiffs' claims in the instant action.

United then moved for summary judgment again in this case, arguing that its refusal to hire Plaintiffs because

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[2] Plaintiffs – joined by co-plaintiff Charles Bowdry – initially filed suit against United on December 16, 1988, alleging claims under the ADA and 42 U.S.C. § 1981. Appellee Supp. App. at 1. Subsequently, on June 20, 1990, Plaintiffs filed a second independent complaint, which they amended on July 24, 1990, charging that United discriminated against them in violation of the ADEA. Appellant App. at 1.5. Upon Plaintiffs' motion, the district court consolidated the two actions. District Ct. Memorandum Opinion and Order at 1. Plaintiffs' § 1981 claim is not before us.

of their failure to meet its weight standards did not discriminate against them because of their age and was not in violation of the ADA. The district court granted summary judgment for United, and Plaintiffs then filed the instant appeal.

Approximately four and one-half months after the district court entered its judgment and Plaintiffs filed this appeal, Plaintiffs filed a motion with the district court to order United to pay certain fees incurred by Plaintiffs' expert witness when that witness was deposed by United.[3] United had paid Plaintiffs' expert $1,961.36, but refused to pay an additional $4,603.00 incurred by the expert for preparation, review, and travel associated with the deposition. The district court denied Plaintiffs' motion as untimely, and Plaintiffs appeal that ruling, as well as the grant of summary judgment for United on their ADEA and ADA claims.

II. ADEA

Plaintiffs articulate two distinct theories to support their claim that United discriminated against them in violation of the ADEA when it refused to hire them as flight attendants.[4] First, Plaintiffs argue that United

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[3] The court had previously ordered each party to bear its own costs.

[4] The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a) (1).

intentionally discriminated against them because of their age. Second, Plaintiffs maintain that United's use of age-neutral weight requirements for hiring, even if not motivated by a discriminatory animus against age, disparately impacted them because of their age. The district court found that Plaintiffs had abandoned their disparate treatment claim in a pretrial concession to the court. As to the disparate impact claim, the court assumed without deciding that the ADEA recognizes a disparate impact theory of discrimination, but ruled that Plaintiffs had not produced evidence upon which a reasonable jury could find that United's use of weight standards had a disparate impact upon older flight attendant applicants.

We review the district court's grant of summary judgment for United de novo, *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997-98 (10th Cir. 1994),[5] and affirm. Contrary to the district court, we conclude that Plaintiffs did not abandon their disparate treatment claim in their pretrial dialogue. Nevertheless, we agree that United was entitled to summary judgment because Plaintiffs have failed to create a genuine dispute of fact that United discriminated against them on the basis of age, either intentionally or in effect.

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[5] We construe the factual record and all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499, 1503 (10th Cir. 1994). "Summary judgment is appropriate if there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Hagelin for President Comm. v. Graves*, 25 F.3d 956, 959 (10th Cir. 1994) (quoting Fed. R. Civ. P. 56(c)), *cert. denied*, 115 S. Ct. 934 (1995).

A. Disparate Treatment

We consider first whether Plaintiffs abandoned their disparate treatment claim below. Plaintiffs' complaint was broad enough to include a disparate treatment claim, and plaintiffs further articulated such a claim in response to United's motion for summary judgment. United addressed that claim in its reply to Plaintiffs' response. However, because the district court found that at a subsequent hearing on United's summary judgment motion Plaintiffs indicated that they were alleging age discrimination only under a disparate impact theory, the court declined to address a disparate treatment claim. We treat the district court's conclusion as a primarily factual finding that Plaintiffs abandoned their intentional discrimination claim, and review for clear error, *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (questions of fact reviewable for clear error). In so doing, we conclude that Plaintiffs clearly did not abandon their intentional discrimination claim.

At the June 1, 1994 hearing on United's summary judgment motion, the following colloquy occurred between Plaintiffs' counsel Mosby and the court:

> THE COURT: . . . I assume you're talking about your disparate impact case at this point in time.
>
> MOSBY: That's the only case I'm talking about, Your Honor, because I think that's our argument in this case, is disparate impact.
>
> THE COURT: So, you're not making a disparate treatment case, is that what you're saying?
>
> MOSBY: Well, it might be difficult under the new cases that have come down lately.

> THE COURT: I wouldn't abandon disparate treatment quite so quickly.
>
> MOSBY: I haven't abandoned it. I'm just going to rest on – [Mosby gets interrupted by court here and conversation shifts focus]

Although Plaintiffs' counsel indicated that Plaintiffs' case rested on a disparate impact argument ("that's our argument in this case, is disparate impact"), he also expressly stated that he did not intend to abandon the disparate treatment theory ("I haven't abandoned it."). Counsel's subsequent statement was cut off, but it suggests he was planning to rest on his brief on that claim.

Furthermore, this is not a case of a party trying to preserve an issue that it has failed to prosecute in substance. Before the purported abandonment, Plaintiffs articulated the legal and factual basis for their disparate treatment claim in response to United's motion for summary judgment, and United responded to the merits of Plaintiffs' claim in reply. Accordingly, we agree with Plaintiffs that they did not abandon their disparate treatment claim.

Turning then to the merits of a disparate treatment claim under the ADEA, a plaintiff must show that age actually motivated an employer's decision. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993). In the instant case, Plaintiffs offer no direct evidence of United's discriminatory intent, but rather rely on circumstantial evidence. Where a discrimination claim rests on circumstantial evidence, we employ the *McDonnell Douglas* burden shifting scheme, *see McDonnell Douglas v. Green*, 411 U.S. 792, 802-05 (1973), which we have applied

to ADEA cases from the Title VII context where it was originally developed, *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 & n.1 (10th Cir. 1988) (applying burden shifting proof scheme to age discrimination claim). Under that scheme, Plaintiffs must first establish a prima face case by showing that (1) they were within the protected age group; (2) they were not hired; (3) they were qualified for the position; and (4) United filled the positions with younger applicants. *See id.* at 1547.

If Plaintiffs can establish a prima facie case, then the burden shifts to United to articulate a facially nondiscriminatory reason for not hiring Plaintiffs. *EEOC v. Flasher*, 986 F.2d 1312, 1315-16 (10th Cir. 1992). If United articulates such a reason, the burden reverts to Plaintiffs to establish United's discriminatory motivation by either (1) presenting direct evidence that age was a determinative factor in United's decision;[6] or (2) presenting evidence upon which a jury could conclude that United's proffered explanation is pretextual and unworthy of credence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Randle v. City of Aurora*, 69 F.3d 441, 452 n.17 (10th Cir. 1995) ("[A] civil rights plaintiff may withstand a motion for summary judgment . . . if the plaintiff establishes a prima facie case and presents evidence that the defendant's proffered nondiscriminatory reason was pretextual – i.e., unworthy of belief.").

As to the prima facie case, neither party disputes that (1) Ellis was within the age group protected by the ADEA

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[6] Of course, Plaintiffs can use direct evidence to establish discrimination and avoid the burden shifting analysis altogether. *See Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993).

each time she applied for a job with United, and Wong-Larkin was within the protected age group beginning with her 1988 application;[7] (2) United rejected applications from each plaintiff while each was protected by the ADEA; and (3) United hired younger applicants instead. However, United argues that Plaintiffs have failed to show that they were qualified for the flight attendant positions – an essential element of the prima facie case – because they did not meet United's weight standards for new hires. In the event that the plaintiffs do establish a prima facie case, United then relies on the weight standards as its nondiscriminatory explanation for why it did not hire Plaintiffs. Plaintiffs argue that United's invocation of its weight standards is a pretext for its true discriminatory motives, and that those weight standards should not be used to determine their qualifications to serve as flight attendants.

Here, even if plaintiffs had established a prima facie case (which we doubt),[8] the court still properly granted

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[7] The ADEA covers individuals who are at least 40 years of age. 29 U.S.C. § 631(a). Prior to January 1, 1987, it covered individuals who were at least 40 years of age but less than 70 years of age. Ellis turned 40 on December 6, 1985, and Wong-Larkin turned 40 on August 8, 1988.

[8] In *MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1118-22 (10th Cir. 1991), we held that it was improper to consider the employer's explanation that it discharged the plaintiff because she was doing unsatisfactory work in assessing whether the plaintiff established a prima facie case. *See id.* at 1119 (following majority of circuits that have "refus[ed] to consider a defendant's proffered reasons for discharge in assessing the existence of a prima facie case"). Rather, we allowed the plaintiff to satisfy her prima facie

summary judgment for defendant because plaintiffs have not presented any evidence that United's explanation for its hiring decisions was pretextual. Plaintiffs have produced no evidence that United selectively applied its weight standards only to older applicants and hired younger applicants who failed to meet those standards. Plaintiffs have not shown that they actually met the weight guidelines and, thus, must have been rejected for

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burden by producing evidence of her objective qualifications, *id.* at 1121, and then placed the burden on the plaintiff to rebut the employer's contention that the plaintiff was not truly qualified at the pretext stage of our analysis, *id.* at 1121-22; *see also Bienkowski v. American Airlines. Inc.*, 851 F.2d 1503, 1506 (5th Cir. 1988) ("The lines of battle may then be drawn over the employer's articulated reason for its action and whether that reason is a pretext for age discrimination."). However, *MacDonald* involved subjective employment criteria, which are particularly easy for an employer to invent in an effort to sabotage a plaintiff's prima facie case and mask discrimination, whereas the present case involves objective hiring criteria applied to all applicants. *MacDonald*, 941 F.2d at 1121 ("[W]e conclude that a plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the *objective qualifications* she held when she was hired. . . . " Emphasis added.) Of course, if a plaintiff can show that the employer has imposed an objective employment criteria *for the purpose of* excluding a protected class, then such a plaintiff will have presented direct proof of discrimination and the burden shifting mechanism of *McDonell Douglas* will not be needed. Here, plaintiffs failed to establish that they met the objective weight qualification for new flight attendants. Nevertheless, even if plaintiffs were deemed to have satisfied the prima facie case, they have failed to establish that United's reason for not hiring them was pretexual.

some other reason.[9] Finally, Plaintiffs have failed to produce other evidence that United chose its weight standards in order to keep out older applicants.

Plaintiffs argue that United could not have been genuinely concerned about their weight because, at least on several of their applications, they satisfied the standards that United applies to flight attendants after they are hired.[10] In essence, Plaintiffs argue that United cannot

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[9] We pause somewhat over Wong-Larkin's 1988 application due to the apparent dispute about her height, but ultimately conclude that she has not created a genuine dispute that she met the guidelines. Wong-Larkin listed her height as 5'6½" at her 1989 interview following that application, and, thus, at her then stated weight of 140 pounds would have satisfied United's standards. However, she would not have satisfied United's standards for someone 5'6". No records were introduced of Wong-Larkin's actual height and weight at that time. However, Wong-Larkin admitted at a deposition that she is 5'6" and that United actually measured her at 5'6" in 1986. Accordingly, we conclude that Wong-Larkin has not provided an evidentiary basis upon which a jury could infer that United treated her as 5'6½", given that she admits that she is physically 5'6" and that United had previously recorded her height as such. Further, the fact that United interviewed Wong-Larkin after receiving her application with a stated weight of 140 pounds does not show that United was not concerned about her weight. Although United generally only interviews applicants who meet its basic hiring criteria – including weight – United interviewed Wong-Larkin in 1989 at an open house and not after screening her application.

[10] Ellis weighed 139 pounds when United interviewed her after her 1987 application, the maximum allowable weight for an incumbent 40-year old 5'4" tall flight attendant. Wong-Larkin weighed 140 pounds when United interviewed her after her 1988 application – at least according to her application – four pounds less than the maximum allowable weight for an incumbent 40-year old 5'6" tall flight attendant.

claim that its weight requirements for new hires promote its business justifications for restricting the weight of flight attendants since flight attendants, once hired, have more relaxed weight requirements. However, United explains that it employs different standards for its current employees because it was obligated to do so by its collective bargaining agreement with its union.[11] Given the age-sensitive criteria applied to flight attendants once

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[11] Plaintiffs argue that United cannot rely on the collective bargaining agreement to explain why it employs dual weight standards because the agreement was not introduced into evidence. However, United produced an affidavit describing the collective bargaining agreement, and Plaintiffs have cited no evidentiary ground on which the representations in that affidavit should have been excluded from consideration for summary judgment purposes. Plaintiffs merely claim on appeal that this affidavit was inaccurate, and have submitted on appeal newly discovered affidavits from an unrelated case that they maintain show that United fraudulently mischaracterized the collective bargaining agreement to the district court. Plaintiffs further request the award of fees and costs that they have incurred responding to this allegedly fraudulent affidavit pursuant to Fed. R. Civ. P. 56(g). However, Plaintiffs' affidavits are not properly before us nor were they before the district court, and, in any event, they do not demonstrate that United acted fraudulently. Furthermore, Plaintiffs have not explained why they did not produce the collective bargaining agreement themselves below, or otherwise attack United's characterization of the agreement. Accordingly, we deny Plaintiffs' motion for fees and costs.

United has filed a motion on appeal to strike Plaintiffs' assertion that United acted in bad faith and to sanction Plaintiffs' counsel. As explained above, we have not considered Plaintiffs' newly submitted evidence. Accordingly, we grant United's motion to strike, although we deny United's motion for sanctions.

hired, United's continued use of age-neutral hiring criteria, at first glance, might make little sense; however, United justified this practice in the district court by asserting that it does not inquire into the age of its applicants because, in many states, such an inquiry is illegal. In any event, an employer's exercise of erroneous or even illogical business judgment does not, by itself, constitute pretext. *See Faulkner v. Super Valu Stores. Inc.*, 3 F.3d 1419, 1426 (10th Cir. 1993) ("The ADEA is not a vehicle for reviewing the propriety of business decisions."). That United allows older incumbent flight attendants greater leeway in their weight once hired because of the union does not establish that United does not truly want all of its new hires to meet its uniform weight requirements or suggest that United selected those criteria with an intent to screen out older applicants. The most Plaintiffs may have shown is that United discriminated between its incumbent employees and applicants on the matter of weight. However, that type of discrimination is not prohibited by the ADEA, and, in any event, United offered the unrefuted explanation for the disparate treatment that the more liberal standard was a product of its collective bargaining agreement. Thus, Plaintiffs' disparate treatment claim must fail, and we affirm the grant of summary judgment for United on this claim.

B. Disparate Impact

Plaintiffs claim, alternatively, that United's hiring decisions violated the ADEA because the decisions were based on weight requirements that disparately impacted older job applicants. Disparate impact claims, as recognized in the Title VII context, *see Griggs v. Duke Power Co.*,

401 U.S. 424, 431 (1971), challenge "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper*, 113 S. Ct. at 1705 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). Whether a disparate impact claim can be brought under the ADEA is, however, an open question. *See Hazen Paper*, 113 S. Ct. at 1706 ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here.") (internal citation omitted); *Faulkner*, 3 F.3d at 1428 (explaining that "[t]he Tenth Circuit has never directly addressed whether a disparate impact claim is cognizable under the ADEA," and leaving the question open). Based on our interpretation of the statutory text and congressional intent, we now answer that question and hold that disparate impact claims are not cognizable under the ADEA; thus, we affirm the district court's grant of summary judgment for United on that ground.

Our interpretation begins with the text of the ADEA. The ADEA's core prohibition of discrimination provides, in relevant part, that

> [i]t shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

> adversely affect his status as an employee, *because of such individual's age*. . . .

(Emphasis added.) 29 U.S.C. § 623(a).

Section 623(a)(1), which contains the ADEA's explicit prohibition of discriminatory refusals to hire, specifically proscribes only decisions not to hire *because of* someone's age. The most obvious reading of the clause, "because of such individual's age," is that it prohibits an employer from intentionally treating someone differently based on his or her age. It would be a stretch to read the phrase "because of such individual's age" to prohibit incidental and unintentional discrimination that resulted because of employment decisions which were made for reasons *other than age*. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1707 (1993) ("The ADEA requires the employer to ignore an employee's age . . . ; it does not specify further characteristics that an employer must also ignore.").[12]

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[12] We do not dwell on Section 623(a) (2) because it does not appear to address refusals to hire at all, *see EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077-78 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995). We recognize that the Supreme Court applied language similar to § 623(a)(2) in Title VII to job applicants in *Griggs*. *Griggs*, 401 U.S. at 426-27 & n.1. However, following *Griggs* in 1972, Congress expressly added applicants to the parallel provision in Title VII, *see* 42 U.S.C. § 2000e. 2(a)(2), but not to the ADEA, indicating an intent that § 623(a) (2) of the ADEA not apply to applicants as § 623(a)(1) expressly does. Moreover, Section 623(a)(2) concludes with the same phrase as does Section 623(a) (1), and a parallel reading of those two sections would require us to conclude that they are both limited to intentional discrimination. *DiBase v. Smithkline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir.), *cert. denied*, 116 S. Ct. 306 (1995); *EEOC v. Francis W. Parker School*, 417 F.3d at 1077-78.

Admittedly, in *Griggs*, the Supreme Court construed language in Title VII that was nearly identical to that found in Section 623(a) of the ADEA to create a disparate impact theory of discrimination. *Griggs*, 401 U.S. at 431 (holding that employment practices which are neutral in form but which result in discriminatory effects are prohibited unless justified by business necessity). Furthermore, we generally interpret the ADEA in tandem with Title VII because the ADEA was based in substantial part on Title VII. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting that "the prohibitions of the ADEA were derived in haec verba from Title VII"); *see also Cooper*, 836 F.2d at 1547 & n.1 (applying burden shifting scheme from Title VII to ADEA disparate treatment claim). However, the ADEA differs from Title VII in salient ways that counsel against interpreting the ADEA to recognize disparate impact claims and that reinforce our reading of the text of the ADEA.[13]

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[13] Congress enacted the ADEA before *Griggs*, and, therefore, could not have intended literally to apply *Griggs* to the ADEA by incorporating language from Title VII. Thus, the relevant inquiry is whether the factors that drove the Supreme Court in Griggs to recognize disparate impact claims in Title VII apply to the ADEA. However, *Griggs* did not base its holding on the text of Title VII, but rather looked primarily to the larger objectives underlying Congress' enactment of Title VII. *See Griggs*, 401 U.S. at 429-30; Michael C. Sloan, "Disparate Impact in the Age Discrimination in Employment Act," 1995 Wis. L. Rev. 507, 517 (1995) ("[T]he Griggs Court did not analyze statutory language to justify its decision, but instead relied on its interpretation of congressional intent and legislative history."). As explained in the text, the ADEA differs from Title VII in these nontextual considerations, as well as in its text and structure.

First, Section 623(f) of the ADEA provides in relevant part that:

> [i]t shall not be unlawful for an employer, employment agency, or labor organization – (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, *or where the differentiation is based on reasonable factors other than age*. . . . (Emphasis added.)

This authorization of actions based on "factors other than age" is similar to section 206(d) (1) of the Equal Pay Act. 29 U.S.C. § 206(d) (1).[14] The Supreme Court interpreted section 206(d)(1) of the Equal Pay Act to preclude disparate impact claims. *County of Washington, Ore. v. Gunther*, 452 U.S. 161, 170-71 (1981) (distinguishing Title VII on the basis of that provision).

Second, the legislative history of the ADEA suggests it was not enacted to address disparate impact claims. Congress enacted the ADEA in large part on a report it commissioned from the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (1965) ("Secretary of Labor Report"). *See EEOC v. Wyoming*, 460 U.S. at 229-31 (tracing legislative history of ADEA and central role of Secretary of Labor Report); *see also Sloan, supra*, at 512 ("Because other materials are sparse, discussions of the ADEA's legislative history usually focus on the Secretary's

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[14] The Equal Pay Act provides, in relevant part, that employers can pay unequal wages to men and women where the pay differential is "based on any other factor other than sex. . . . " 29 U.S.C. § 206(d)(1).

Report."). That report differentiated between what it termed "arbitrary discrimination" based on age (intentional discrimination based on age stereotypes) and problems resulting from factors that "affect older workers more strongly, as a group, than they do younger employees," (disparate impact) *id.* at 5, 11. The report then recommended that Congress prohibit "arbitrary discrimination," but that factors which "affect older workers" be addressed through programmatic measures to improve opportunities for older workers. *Id.* at 21-25. The ADEA's stated purposes and sections 622 and 623 reflect different approaches for intentional or arbitrary discrimination and the more benign problem of disparate impact.

Third, a comparison of Congress' subsequent amendments to Title VII and to the ADEA further reveals this congressional intent. Specifically, Congress explicitly added a disparate impact cause of action to Title VII in the 1991 Civil Rights Act, *see* Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991), codified at 42 U.S.C. § 2000e-2(k). However, Congress added no such parallel provision to the ADEA, despite its amendment of other portions of the ADEA, *see, e.g., id.* at § 115, 105 Stat. at 1079 (amending the time period within which an employee may file civil actions); *id.* at § 302(2), 105 Stat. at 1088 (extending coverage of ADEA to congressional employees), thus signalling its intent not to provide for a disparate impact cause of action under the ADEA.

Fourth, the Supreme Court's recent *Hazen Paper* decision further informs our interpretation of the ADEA. The Court, although not expressly ruling on the issue, indicated in dicta that the ADEA only prohibits intentional discrimination. In *Hazen Paper,* the Court addressed a

disparate treatment claim against an employer who fired a 62 year old employee just a few weeks before his pension benefits would vest. The Court observed that "[d]isparate treatment captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper*, 113 S. Ct. at 1706. Even more to the point, the Court said that the ADEA was enacted to prevent older workers from being stigmatized by inaccurate stereotyping and that,

> "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true *even if the motivating factor is correlated with age*, as pension *status typically is*." *Id.* (Emphasis added.)

And, reiterated that theme again later when it said,

> The law requires the employer to ignore an employee's age . . . ; it does not specify further characteristics [like the correlation between age and the likelihood that a worker will qualify for a pension] that an employer must also ignore." *Id.* (Emphasis added.)

Although the Court's holding was technically limited to the disparate treatment claim before it, one cannot read that opinion without receiving the strong impression that the Supreme Court is suggesting that the ADEA does not encompass a disparate impact claim.[15] The Chief Justice

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[15] For example, the Court also explained that an employer cannot rely on age as a proxy for some quality like productivity, but "must instead focus on those factors directly," 113 S. Ct. at 1706, implying that an employer could in good faith rely on some factor other than age even if it similarly resulted in an older employee losing his or her job.

and Justices Kennedy and Thomas concurred, noting that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Hazen*, 113 S. Ct. at 1710.

Fifth, of those courts that have considered the issue since Hazen, there is a clear trend toward concluding that the ADEA does not support a disparate impact claim. *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (holding that there is no disparate impact claim under the ADEA); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076.77 (7th Cir. 1994) (same); *Lyon v. Ohio Educ. Ass'n & Professional Staff Union*, 53 F.3d 135, 138-39 (6th Cir. 1995) (same). *But see, Mangold v. California Pub. Utilities Comm'n*, 67 F.3d 1470, 1474 (9th Cir. 1995) (not deciding the issue but referring to earlier Ninth Circuit precedent – one pre-*Hazen* case and one post-Hazen case perceiving no conflict between *Hazen* and its decision – that recognize a disparate impact claim under the ADEA); *Houghton v. Sipco, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994) (assuming, without analysis, that a disparate impact claim is viable under the ADEA).

Finally, we note that permitting disparate impact age discrimination claims would create several practical problems. In particular, many courts have interpreted the ADEA to prohibit an employer from favoring anyone younger than a protected plaintiff. *See Rinehart v. City of Independence. Mo.*, 35 F.3d 1263, 1266 & n.2 (8th Cir. 1994) (noting majority position), *cert. denied*, 115 S. Ct. 1822 (1995). Accordingly, the line defining the class that is disparately impacted by a challenged policy is an imprecise one, which could be manipulated to either strengthen

or weaken the impact of a policy on some age group. As then District Court Judge Higgenbotham remarked,

> the disparate impact analysis in race cases cannot be extended easily to age cases given that the facially neutral factors challenged almost certainly will generate different impacts for different age groups because each point in the life cycle tends to be associated with different distributions. "Unless virtually all facially neutral classifications are to become suspect, the use of nonage factors ought to enjoy a strong presumption of reasonableness notwithstanding the age-specific differential impacts that inevitably ensue."

Cunningham v. Central Beverage, Inc., 486 F. Supp. 59, 62-63 (N.D. Tex. 1980) (quoting Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L.J. 27, 35-37 (1979)).

Thus, policy considerations add to our analysis of precedent and the ADEA's text, structure, purposes, and legislative history, and confirm our ultimate holding that plaintiffs cannot bring a disparate impact claim under the ADEA. As such, we affirm the district court's grant of summary judgment for United on Plaintiff's disparate impact claim on that ground.

III. ADA

Even if United did not violate the ADEA, Plaintiffs maintain that United violated the ADA by not fulfilling its affirmative duty under that statute to hire Plaintiffs. The ADA defines an airline employee who was employed by a covered carrier for four years prior to passage of the

ADA as a "protected employee." 49 U.S.C. § 42101(a) (3). A protected employee who loses his or her job as a result of deregulation becomes a "designated employee" and is entitled to a right of first hire by other covered carriers. *Id.* at § 42103(a). However, under Department of Labor regulations promulgated pursuant to the ADA, an air carrier may require an applicant to meet "any prerequisites or qualifications determined by it for any vacancy" with the exception of initial hiring age and certain other criteria not here relevant. 29 C.F.R. §§ 220.20(a) & 220.21(a)(1). United argues that its weight requirements for new hires constitute such permissible prerequisites or qualifications, and that Plaintiffs' ADA claim, therefore, fails as a matter of law. Plaintiffs do not challenge the Department of Labor regulations per se, but respond that United's use of weight standards is pretextual for "limit[ing] employment opportunities for designated employees on the basis of . . . [i]nitial hiring age." Plaintiffs further argue that even if the standards do not discriminate on the basis of age, they are not job-related, and, therefore, cannot be considered bona fide job qualifications. We disagree for substantially the same reasons outlined above in our consideration of Plaintiffs' ADEA claim.

As a general matter, weight requirements are permissible job-related criteria for flight attendants. As the Department of Labor stated in an opinion letter contained in the record before us,

> carriers [possess] broad latitude in determining qualifications for prospective employees. For example, height, weight, or vision requirements

> are examples of commonly used, objective hiring criteria for various jobs. . . . We believe that the carriers are entitled to apply all such criteria, and to do so in diverse ways.

Letter from H. Charles Spring, Acting Deputy Under Secretary, U.S. Department of Labor, to Mary P. Weir, Northwest Airlines, Inc. (June 20, 1991); *see also Jarrell v. Eastern Air Lines. Inc.*, 430 F. Supp. 884, 891 (E.D. Va. 1977), *aff'd* 577 F.2d 869 (4th Cir. 1978). Accordingly, we do not believe the ADA permits us to second-guess the business judgment of employers any more than does the ADEA. An air carrier may require an applicant to meet "*any* prerequisites of qualifications" except initial hiring age, 29 C.F.R. §§ 220.20(a) & 220.21(a)(1) (emphasis added), and other criteria not here involved, and, as explained above, Plaintiffs have not shown that United's use of weight standards was pretextual.[16]

The Department of Labor opinion letter also stated that an airline's hiring discretion is not unlimited, and that an airline cannot "apply qualifications that defeat the

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[16] In the context of Plaintiffs' ADEA claim, we did not consider Wong-Larkin's September 1986 application, because she was only 38 years old at the time and not yet protected by the ADEA. Because no threshold age requirement exists for the ADA, we consider that episode in the context of Plaintiffs' ADA claim. However, in so doing we do not alter our conclusion that Plaintiffs have failed to establish pretext. Although no record exists of Wong-Larkin's actual weight in September 1986, she weighed 142 pounds several months earlier while working at Frontier and admitted that she likely weighed the same when she applied to United in September. She also listed her height at that time as 5'6". At that height and weight, Wong-Larkin exceeded United's weight requirements.

purpose of the Act." However, in addition to their failure to establish that United discriminated against them based on their age, Plaintiffs have also failed to introduce any evidence that the weight standards acted generally to frustrate the first hire rights of designated employees by preventing them from getting hired. Accordingly, we do not believe that United's use of weight standards defeated the purposes of the ADA or were otherwise impermissible, and we affirm the district court's grant of summary judgment on Plaintiffs' ADA claim.

IV. EXPERT WITNESS FEES

Independent of their discrimination claims, Plaintiffs argue that United should have to pay fees incurred by Plaintiffs' expert witness for preparation, review, and travel associated with United's deposition of that expert.[17] Fed. R. Civ. P. 26(b)(4)(C) provides that "[u]nless manifest injustice would result . . . the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery. . . . " United paid Plaintiffs' expert $1,961.36 for its deposition, but refused to pay $4,603.00 in attendant expenses. The district court denied Plaintiffs' motion to compel United to pay additional expenses because (1) Plaintiffs' motion was untimely; (2) the court lacked jurisdiction over the issue because the action had already been appealed

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[17] Plaintiffs appealed this issue in case no. 95-1034 and moved to consolidate that appeal with its appeal of the ADEA and ADA issues in case no. 94-1351. Having already heard the related appeals as separate matters, we reject Plaintiffs' motion but nevertheless address both appeals in this opinion.

before Plaintiff filed its motion; and (3) Plaintiffs' request was not for "reasonable" fees, as required under Fed. R. Civ. P. 26(b)(4) (C), even if fees for review, preparation and travel time are recoverable generally. We agree that Plaintiffs' motion was untimely and affirm on that ground. Therefore, we do not reach the other issues presented in the district court's ruling.

Rule 26(b)(4) (C) itself does not specify whether or when a party must demand payment of fees to its expert. However, the advisory committee notes to the rule provide that "[t]he court may issue the latter order [to pay fees and expenses that a party incurs in obtaining information from an expert] as a condition of discovery, or it may delay the order until after discovery is completed." Fed. R. Civ. P. 26(b) (4)(C) (Notes of Advisory Committee on Rules to 1970 Amendment). Pursuant to that authorization, courts have awarded fees under Rule 26(b)(4)(C) after trial. *See, e.g., Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 336 (5th Cir.), *cert. denied*, 116 S. Ct. 173 (1995); *Chambers v. Ingram*, 858 F.2d 351, 360-61 (7th Cir. 1988). Nevertheless, Plaintiffs cite no authority for the proposition that a court *must* award Rule 26(b)(4)(C) fees no matter how long after entry of final judgment a party requests such fees. In the present case, we do not believe the district court abused its discretion[18] in ruling that

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[18] Although we review a district court's conclusions of law de novo, we believe the present dispute, as presented in this appeal, falls within the court's general discretion over discovery disputes. *See GWN Petroleum Corp. v. OK-TEX Oil & Gas. Inc.*, 998 F.2d 853, 858 (10th Cir. 1993) (discovery rulings are reviewed for an abuse of discretion); *see also Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1149 (10th Cir.) (district court's award of

Plaintiffs' motion for fees was untimely given that it was filed four and one-half months after the court had entered a final judgment in the case and ordered each party to bear its own costs.[19]

Courts have granted motions for fees under Rule 26(b)(4)(C) that were filed even later than Plaintiffs' motion in the instant case. *See, Kellstrom*, 50 F.3d at 336 (holding that request for Rule 26 costs filed nine months after original application for taxation of costs not untimely). However, special circumstances usually exist to excuse the delay. *See id.* at 336 n.37 ("We do not mean to imply that, under all circumstances, a party may file a request for Rule 26(b)(4)(C) costs nine months after judgment on the merits. The record reflects multiple changes and disputes about the fees extending over a period of many months. Accordingly, we merely hold that on the specific facts of this case, Comstock may recover its Rule 26(b)(4) (C) costs."). Here, the parties engaged in a prolonged dispute about United's responsibility to reimburse

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costs reviewed under abuse of discretion standard), *cert. denied* 502 U.S. 867 (1991).

[19] Plaintiffs argue that United's refusal to pay these fees actually constituted a violation of this earlier order directing each party to pay its own costs. Plaintiffs reason that the full amount of the expert's fees were costs incurred by United since United requested the deposition. As such, Plaintiffs assert that they did not actually need to file a motion for fees under Fed. R. Civ. P. 26(b)(4)(C). However, the district court apparently did not agree with Plaintiffs' contention that United violated its earlier order, given that it rejected Plaintiffs' subsequent motion. We decline now to question the district court's construction of its own order, and focus only on Plaintiffs' subsequent motion.

Plaintiffs' expert, but the dispute ran its course and reached an impasse before the court granted summary judgment for United, as the letters exchanged between opposing counsel in November and December of 1993 reflect. Nothing in the intervening four and one-half months altered the dispute. Accordingly, we hold that the district court did not abuse its discretion in declining to award Plaintiffs fees to which they might otherwise have been entitled if it were not for their waiting so long to bring the issue to the court's attention.[20]

V. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment for United. We further AFFIRM the district court's denial of Plaintiffs' motion for Rule 26(b)(4)(C) fees on the ground that the motion was untimely.

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[20] United argues that we lack jurisdiction even to consider this issue because Plaintiffs failed to perfect a proper appeal of the district court's ruling. Specifically, United contends that Plaintiffs' failure to appeal the issue of costs pursuant to Fed. R. App. P. 4(a)(1) within thirty days of the district court's grant of summary judgment and order to each party to bear its own costs barred the Plaintiffs from later appealing following the district court's denial of its motion for additional expert witness fees. United moved to dismiss Plaintiffs' appeal of the expert witness fee issue on that ground. We deny United's motion because Plaintiffs appealed the district court's ruling on its motion for additional fees in a timely manner. We further deny United's motion for fees and costs in responding to Plaintiffs' appeal because such appeal was not frivolous.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 90-S-1085

CRIST ELLIS and NORMA WONG-LARKIN,
Plaintiffs,

v.

UNITED AIR LINES, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Jun. 30, 1994)

THIS MATTER comes before the court on the Defendant's Motion for Summary Judgment, filed January 14, 1994. The court has reviewed the motion, the Plaintiffs' response, the entire case file, the presentations by counsel at the June 1, 1994 hearing, and the applicable law and is fully advised in the premises.

Background

On January 7, 1991, this court consolidated the Airline Deregulation Act (ADA) claims of Plaintiffs Ellis and Wong-Larkin from *Bowdry, et al. v. United Air Lines,* Civil Action No. 88-S-1997, into this case. On motion for summary judgment in *Bowdry,* this court concluded that because certain Plaintiffs were deemed to have relinquished their first-hire rights by signing the Election of Severance Benefits and Waiver of Claims (Waiver), United could not have violated those Plaintiffs' first-hire

rights under the ADA, 49 U.S.C. § 1552. The court also determined that the six-month statute of limitations from Colo. Rev. Stat. §§ 8-3-110(16) and 24-34-403 was applicable to the Plaintiffs' ADA claims. Therefore, summary judgment was granted for United on certain Plaintiffs' ADA claims in the *Bowdry* case.

On April 30, 1991, the court granted summary judgment on the Plaintiffs' ADA claims in this case for similar reasons. Plaintiffs Ellis and Wong-Larkin executed the same Waiver. During the six-month statutory time period that the court determined Ellis and Wong-Larkin had rights under the ADA (August 24, 1986 through October 14, 1986), United did not hire any persons into a flight attendant position. Therefore, United could not have violated the Plaintiffs' rights under the ADA and the court granted summary judgment for United on the Plaintiffs' ADA claims.

On February 13, 1992, the Tenth Circuit Court of Appeals reversed this court's summary judgment order in *Bowdry* on both grounds, effectively reversing the summary judgment order in this case on both grounds. *Bowdry v. United Air Lines, Inc.*, 956 F.2d 999 (10th Cir.), *cert. denied*, 113 S.Ct. 97 (1992). The Tenth Circuit ruled that: (1) the Plaintiffs did not lose their first-hire rights by executing the Waiver; and (2) the applicable statute of limitations is the two-year Colo. Rev. Stat. § 13-80-102(g). Accordingly, at this time, the Plaintiffs' First Claim for Relief under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the Plaintiffs' consolidated claim under the Airline Deregulation Act (ADA), 49 U.S.C. § 1552, both remain at issue.

Motion for Summary Judgment

The Plaintiffs claim that they were discriminated against based on their age in violation of the ADEA because the height/weight requirements applied to them as new applicants were different than the height/weight requirements applied to incumbent employees. At the June 1, 1994 hearing, the Plaintiffs indicated that they are alleging age discrimination under a disparate impact theory only. This alleged age discrimination is also the basis for the Plaintiffs' ADA claim.

The Defendant moves for summary judgment on the grounds that the ADEA permits the two different height/weight requirements because "the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). In addition, because the Plaintiffs do not meet the lawful hiring criteria for new applicants, they are not entitled to protection under the ADA.

Plaintiffs' ADEA claim

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Thrasher v. B & B Chemical Company, Inc.*, 2 F.3d 995, 996 (10th Cir. 1993) (citations omitted). The moving party bears the initial burden of showing that there is an absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. City of Watonga*,

942 F.2d 737, 743 (10th Cir. 1991). If the moving party meets this burden, the non-moving party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). To sustain this burden, the non-moving party cannot rest on the mere allegations in the pleadings. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Applied Genetics Int'l. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). If the nonmoving party fails to make the required showing with respect to any element essential to its case and on which it bears the burden of proof at trial, then the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

The Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA. *Hazen Paper Co. v. Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1706 (1993). While the Tenth Circuit has never directly addressed whether a disparate impact claim is cognizable under the ADEA, it has indicated that the prudent course is to merely assume the applicability of the disparate impact analysis without deciding whether it is a viable theory of recovery under the ADEA. *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993). A disparate impact theory of recovery involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on

one group than another and cannot be justified by business necessity." *Faulkner*, 3 F.3d at 1428, citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977). Unlike disparate treatment, the disparate impact theory does not require proof of discriminatory motive or intent. *Faulkner*, 3 F.3d at 1428, citing *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir. 1991). Generally, a plaintiff must establish a prima facie case of age discrimination by a preponderance of the evidence. *Faulkner*, 3 F.3d at 1425, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). To establish a prima facie case of disparate impact discrimination, the plaintiff must show that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group. *Faulkner*, 3 F.3d at 1428 (citations omitted). A plaintiff may use statistics to establish a prima facie case of disparate impact, *Faulkner*, 3 F.3d at 1428 (citations omitted), but a plaintiff must show more than mere statistical disparities. *Smith v. Denver Public School Board*, 767 F.Supp. 226, 229 (D. Colo. 1991). The plaintiff must also identify an employment practice responsible for an observed disparate impact. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989). Once an employment practice has been identified, the plaintiff must offer evidence of a kind and degree sufficient to show that the practice has caused a disparate impact on members of a protected group. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

A plaintiff who succeeds in establishing a prima facie case of disparate impact does not automatically survive a motion for summary judgment. *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1121 (10th

Cir. 1991) (citations omitted). Once the plaintiff establishes a prima facie case, the burden shifts to the employer to produce evidence demonstrating a "business justification" for its employment practices. *Faulkner*, 3 F.3d at 1428, citing *Wards Cove*, 490 U.S. at 658. A business justification proffered by an employer must have a manifest relationship to the employment in question, but need not be essential or indispensable to the employer's business. *Faulkner*, 3 F.3d at 1429 (citations omitted). The ADEA "is not intended as a vehicle for judicial review of employment decisions which are made in good faith and are not actuated by age bias." *Faulkner*, 3 F.3d at 1426, citing *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985). The court will not second-guess the propriety of business decisions in the absence of some evidence of impermissible motives. *Faulkner*, 3 F.3d at 1426-27, citing *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1404 (10th Cir. 1988).

An employer satisfies the burden of production by presenting its reasons for the challenged actions with sufficient specificity to allow the plaintiff to demonstrate pretext. *Faulkner*, 3 F.3d at 1434, citing *Pitre v. Western Electric Co.*, 843 F.2d 1262, 1265-66 (10th Cir. 1988). If the employer presents such evidence, the plaintiff may still prevail if he or she can persuade the factfinder that other tests or selection devices, without a similarly undesirable disparate effect, would also serve the employer's legitimate interests. *Faulkner*, 3 F.3d at 1428-29 (citations omitted). The plaintiff must prove that the employer was using the challenged employment practice merely as a pretext for discrimination. *Wards Cove*, 490 U.S. at 660.

The sum and substance of the Plaintiffs' case is that: (1) United knew that the Plaintiffs were in the protected age group when they applied for employment, and (2) the different height/weight requirements for new applicants versus incumbent employees are not justified by any business necessity, but are merely a pretext for age discrimination. Under United's height/weight requirements, a new female applicant who is five feet four inches tall must weigh no more than 132 pounds, while an incumbent female employee of the same height can weigh up to 135 pounds if between 35 and 45 years of age, 138 pounds if between 45 and 55 years of age, and 141 pounds if age 55 or older. Plaintiffs argue that the stricter height/weight requirements for new applicants effectively keep United's new hires younger, in violation of the ADEA and the ADA. Unfortunately, the facts and the law do not support Plaintiffs' arguments in opposition to United's motion for summary judgment.

First, it has been determined that airline standards for height and weight need not reflect the general population's characteristics. *Air Line Pilots Ass'n. v. United Air Lines, Inc.*, 26 Fair Emp. Prac. Case (BNA) 607 (E.D.N.Y. 1979). Height and weight requirements are commonly used objective criteria that air carriers are entitled to apply. Dept. of Labor opinion letter 23B (Exhibit F to Defendant's Motion for Summary Judgment). It is not for the court to question the wisdom of United's choice of employment qualifications. *See Faulkner*, 3 F.3d at 1426-27. The Plaintiffs have not shown that height/weight requirements are *per se* improper.

Second, there is no disparate impact if the requirement is one that the affected employee or applicant can

readily observe. *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Rogers v. American Airlines, Inc.*, 527 F.Supp. 229, 231 (S.D.N.Y. 1981). United requires certain weights for certain corresponding heights. While the Plaintiffs cannot change their ages, they both admit that they had the ability to control their weight at all times relevant to this case and that they could have met the height/weight requirements for new applicants. (Deposition testimony of Norma Wong-Larkin, Exhibit A to Defendant's Motion for Summary Judgment Vol. I p. 188; Deposition testimony of Crist Ellis, Exhibit B to Defendant's Motion for Summary Judgment, Vol. III p. 166).

Third, because the Plaintiffs have not presented any evidence that weight is correlated to age, the Plaintiffs cannot show that United's height/weight criteria caused a significant disparate impact on the protected age group. There is no evidence before the court of any inevitable impact of aging on a person's ability to maintain a given weight. There is no evidence in the record that advancing age causes weight gain. The Plaintiffs have not shown any connection between United's height/weight requirements and age. The ADEA prohibits discrimination on the basis of age; it does not prohibit differential treatment on the basis of any other characteristics. *Biggins*, 113 S.Ct. at 1707. An employer may treat employees or applicants differently for many reasons, but the ADEA is only implicated where age is the reason. *See Faulkner*, 3 F.3d at 1433-34.

Fourth, United has produced evidence demonstrating a legitimate business justification for its relaxation of the height/weight standards for incumbent employees.

United has presented evidence that the height/weight requirements were relaxed for incumbent employees as a result of collective bargaining between United and the flight attendants' union. (Affidavit of Judith Hart, Exhibit C to Defendant's Motion for Summary Judgment). Before they are hired, new applicants are not covered by the collective bargaining agreement between the flight attendants' union and United. If they are hired, new employees may join the union and be covered by the collective bargaining agreement. The mandates of the collective bargaining agreement provide a legitimate nondiscriminatory business reason for the different height/weight requirements for incumbent employees and new applicants. *See Mann v. Frank*, 795 F.Supp. 1438, 1455 (W.D. Mo. 1992), *jdgmt. aff'd.*, 7 F.3d 1365 (8th Cir. 1993); *Robinson v. American Airlines, Inc.*, 722 F.Supp. 757, 766 (D.D.C. 1989), *jdgmt. aff'd.*, 908 F.2d 1020 (D.C. Cir. 1990); *Air Line Pilots Ass'n. v. United*, 26 F.E.P. at 607.

Finally, the Plaintiffs have not shown that United's proffered justification is a pretext for age discrimination. *See Rea v. Martin Marietta Corp.*, No. 93-1101, slip op. at 6 (10th Cir. June 26, 1994) (citations omitted). Even if they could show that United's articulated business justification is not worthy of credence, Plaintiffs must still prove that the differentiation between incumbent employees and new applicants violates the ADEA. *See Faulkner*, 3 F.3d at 1428-29. If no facts relating to the pretextuality of the defendant's action remain in dispute, summary judgment is appropriate. *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 798 (10th Cir. 1993). Plaintiffs have not offered any statistical, anecdotal, or any other kind of evidence upon which a finder of fact could infer

that United's requirements and justification for those requirements constituted a pretext for age discrimination. The court concludes that Plaintiffs cannot meet their burden on summary judgment of discrediting United's legitimate, nondiscriminatory reason for the two separate height/weight standards. United is entitled to summary judgment on the Plaintiffs' ADEA claim.

Plaintiffs' ADA claim

In their original ADA claim, Plaintiffs asserted that United violated their first-hire rights under § 1552. In their response to United's motion for summary judgment and at the June 1, 1994 hearing, the Plaintiffs argued that United's use of "arbitrary age barriers" violated 29 C.F.R. § 200.21(a)(1). Because the Plaintiffs' evidence failed to show that United's requirements are unlawful barriers to the protected age group under the ADEA, it follows that the Plaintiffs' proof is likewise lacking under both versions of their ADA claim. It is undisputed that, at the times the Plaintiffs applied for employment at United, the Plaintiffs did not meet United's height/weight requirements for new applicants. Therefore, the Plaintiffs did not meet United's hiring prerequisites and were not eligible for employment or entitled to first-hire rights. United is entitled to summary judgment on the Plaintiffs' ADA claim.

Accordingly, IT IS ORDERED:

1. The Defendant's Motion for Summary Judgment is GRANTED.

2. Summary judgment is hereby entered in favor of Defendant United and against Plaintiffs on the First Claim for Relief under the ADEA and on the consolidated claim under the ADA.

3. No claims remaining, this civil action is dismissed.

DATED at Denver, Colorado, this 30th day of June, 1994.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

Case No. 90-S-1085

CERTIFICATE OF MAILING

I hereby certify that a copy of the MEMORANDUM OPINION AND ORDER signed by Judge Daniel B. Sparr and filed on June 30, 1994, was mailed on July 1, 1994, to the following:

Elisa J. Moran, Esq.
8451 East Oregon Place
Denver, CO 80231

John Mosby, Esq.
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Michael D. Nosler, Esq.
Kris J. Kostolansky, Esq.
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DC Box 11

Magistrate Judge O. Edward Schlatter

/s/ Judy L. Poor
Secretary/Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CRIST ELLIS and NORMA WONG-LARKIN,
Plaintiffs - Appellants,
v.
UNITED AIRLINES, INC., a Delaware corporation,
Defendant - Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

No. 94-1351
(D.C. No. 90-S-1085)

ORDER

Entered February 9, 1996

Before EBEL and McKAY, Circuit Judges, and COOK*, Senior District Judge.

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*Honorable H. Dale Cook, Senior District Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By: /s/ Barbara Schumaker
Deputy Clerk

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-S-1085 (consolidated with 88-S-1997)

CRIST ELLIS and NORMA WONG-LARKIN,
Plaintiffs,

v.

UNITED AIR LINES, INC.,
Defendant.

JUDGMENT

(Filed Jul. 05, 1994)

Pursuant to and in accordance with the Memorandum Opinion and Order signed June 30, 1994 by the Honorable Daniel B. Sparr, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of the defendant, United Air Lines, Inc., and against the plaintiffs, Crist Ellis and Norma Wong-Larkin, on plaintiffs' First Claim for Relief under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* and on plaintiffs' consolidated claim under the Airline Deregulation Act (ADA), 49 U.S.C. § 1552. it is

FURTHER ORDERED that plaintiffs' First Claim for Relief under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* and plaintiffs' consolidated claim under the Airline Deregulation Act (ADA), 49 U.S.C. § 1552 are hereby dismissed with prejudice. It is

FURTHER ORDERED that this action is hereby dismissed.

FURTHER ORDERED that the parties shall bear their own costs.

DATED at Denver, Colorado this 5th day of July, 1994.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich,
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 90-S-1085

CERTIFICATE OF MAILING

I hereby certify that a copy of the Judgment was mailed to the following on July 5, 1994.

Elisa J. Moran, Esq.
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John Mosby, Esq.
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Michael D. Nosler, Esq.
Kris J. Kostolansky, Esq.
Rothgerber, Appel, Powers & Johnson
DC Box 11

Magistrate Judge O. Edward Schlatter

/s/ Carol Hand
Deputy Clerk

EEOC U.S. Equal Employment Opportunity Commission

Laws Enforced

by the

U.S. Equal Employment

Opportunity Commission

Title VII of the Civil Rights Act of 1964

Equal Pay Act

Age Discrimination in Employment Act

Rehabilitation Act of 1973

Title I of the Americans with Disabilities Act

Civil Rights Act of 1991

EDITOR'S NOTE: The following is the text of the Age Discrimination in Employment Act of 1967 (Pub. L. 90-202) (ADEA), as amended, as it appears in volume 29 of the United States Code, beginning at section 621. The ADEA prohibits employment discrimination against persons 40 years of age or older. The Older Workers Benefit Protection Act (Pub. L. 101-433) amends several sections of the ADEA. In addition, section 115 of the Civil Rights Act of 1991 (P.L. 102-166)

amends section 7(e) of the ADEA (29 U.S.C. 626(e)). These amendments appear in boldface type. Cross references to the ADEA as enacted appear in italics following each section heading. Editor's notes also appear in italics.

An Act

To prohibit age discrimination in employment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Age Discrimination in Employment Act of 1967".

* * *

Statement of Findings and Purpose

SEC. 621 *[Section 2]*

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Education and Research Program

SEC. 622 *[Section 3]*

(a) The Secretary of Labor *[EEOC]* shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor *[EEOC]* shall carry on a continuing program of education and information, under which he may, among other measures –

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title *[section 12]*.

Prohibition of Age Discrimination

SEC. 623 *[Section 4]*

(a) It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate

against member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer of membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization –

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in

any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) *[Repealed]*

(h)(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the –

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control of the employer and the corporation.

(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(j)(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits –

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan –

(A) if distribution of benefits under such plan with respect to such employee has commenced

as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title *[section 206(a)(3) of the Employee Retirement Income Security Act of 1974]* and section 401(a)(14)(C) of title 26 *[the Internal Revenue Code of 1986]*, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title of [*section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974*] or section 411(a)(3)(B) of title 26 *[the Internal Revenue Code of 1986]*, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the

case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26 *[the Internal Revenue Code of 1986]*) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26 *[the Internal Revenue Code of 1986]*.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 *[the Internal Revenue Code of 1986]* and subparagraphs (C) and (D) of section 411(b)(2) of title 26 *[the Internal Revenue Code of 1986]* shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement

age described in section 1002(24)(B) of this title *[section 3(24)(B) of the Employee Retirement Income Security Act of 1974]* and section 411(a)(8)(B) of title 26 *[the Internal Revenue Code of 1986]*.

(9) For purposes of this subsection –

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title *[section 3 of the Employee Retirement Income Security Act of 1974]*.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26 *[the Internal Revenue Code of 1986]*.

(k) A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Notwithstanding clause (i) of (ii) of subsection (f)(2)(B) of this section –

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(A) an employee pension benefit plan (as defined in section 1002(2) of this title *[section 3(2) of the Employee Retirement Income Security Act of 1974]*) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title *[section 3(35) of such Act]*) provides for –

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26 *[the Internal Revenue Code of 1986]*) that –

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age) –

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit

years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability

benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions) –

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

Study by Secretary of Labor

SEC. 624 *[Section 5]*

(a)(1) The Secretary of Labor *[EEOC]* is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include –

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title *[section 12(a)]* to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title *[section 12(c)]*, relating to certain executive

employees, and the exemption contained in section 631(d) of this title *[section 12(d)]*, relating to tenured teaching personnel.

(2) The Secretary *[EEOC]* may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

Transfer of Functions

[All functions relating to age discrimination administration and enforcement vested by Section 6 in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission effective January 1, 1979 under the President's Reorganization Plan No. 1.]

Administration

SEC. 625 *[Section 6]*

The Secretary *[EEOC]* shall have the power –

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical

assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

Recordkeeping, Investigation, and Enforcement

SEC. 626 *[Section 7]*

(a) The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title *[sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended]*.

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title *[sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended]*, and subsection (c) of this section. Any act prohibited under section 623 of this title *[section 4]* shall be deemed to be a prohibited act under section 215 of this title *[section 15 of the Fair Labor Standards Act of 1938, as amended]*. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title *[sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended]*: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court

shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Section 259 of this title *[section 10 of the Portal-to-Portal Act of 1947]* shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title *[section 11(a)]* against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f)(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such

individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement

of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title *[section 4 or 15]* may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1) or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver

was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Notice to be Posted

SEC.627 *[Section 8]*

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

Rules and Regulations

SEC.628 *[Section 9]*

In accordance with the provisions of subchapter II of chapter 5 of title 5 *[United States Code]*, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions

of this chapter as it may find necessary and proper in the public interest.

Criminal Penalties

SEC.629 *[Section 10]*

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

Definitions

SEC.630 *[Section 11]*

For the purposes of this chapter –

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups or persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar

year. Provided, That prior to June 30, 1968, employers having fewer than fifty employers shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization,, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number

of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended *[29 U.S.C. 151 et seq.]*, or the Railway Labor Act, as amended *[45 U.S.C. 151 et seq.]*; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the

meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

[The exclusion from the term "employee" of any person chosen by an elected official "to be on such official's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office," remains in section 11(f). However, the Civil Rights Act of 1991 now provides special procedures for such persons who feel they are victims of age and other types of discrimination prohibited by EEOC enforced statutes. See section 321 of the Civil Rights Act of 1991.]

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 *[29 U.S.C. 401 et seq.]*.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act *[43 U.S.C. 1331 et seq.]*.

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits,

including such benefits provided pursuant to a bona fide employee benefit plan.

Age Limitation

SEC.631 *[Section 12]*

(a) The prohibitions in this chapter *[except the provisions of section 4(g)]* shall be limited to individuals who are at least 40 years of age.

(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title *[section 15]*, the prohibitions established in section 633a of this title *[section 15]* shall be limited to individuals who are at least 40 years of age.

(c)(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or

make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of title 20 *[section 1201(a) of the Higher Education Act of 1965]*).

Annual Report

SEC.632 *[Section 13]*

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age

level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

Federal-State Relationship

SEC.633 *[Section 14]*

(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title *[section 7]* before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of

this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Nondiscrimination on Account of Age in Federal Government Employment

SEC.633a *[Section 15]*

(a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 *[United States Code]*, in executive agencies as defined in section 105 of title 5 *[United States Code]* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue

such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall –

> (1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;
>
> (2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and
>
> (3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment

Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) When an individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title *[section 12(b)]* and the provisions of this section.

(g)(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the

amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title *[section 12(b)]*, as added by the Age Discrimination in Employment Act Amendments of 1978.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

EFFECTIVE DATE

[Section 16 of the ADEA (not reproduced in the U.S. Code)]

This Act shall become effective one hundred and eighty days after enactment, except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment the Secretary of Labor [EEOC] is authorized to issue such rules and regulations as may be necessary to carry out its provision.]

Appropriations

SEC.634 *[Section 17]*

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

[Approved December 15, 1967]

STATUTES

49 U.S.C. app. § 1552 (1988). Employee protection program.

(a) General rule

(1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds, upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who on account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation.

(2) No employee who is terminated for cause shall receive any assistance under this section.

(b) Monthly assistance computation

(1) An eligible protected employee shall, subject to such amounts as are provided in appropriation Acts, receive a monthly assistance payment, for each month in which he is an eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of

employees. In computing such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amount of any unemployment compensation received by the protected employee.

(2) If an eligible protected employee is offered reasonably comparable employment and such employee does not accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have been entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining pursuant to the maximum provided in subsection (e) of this section.

(c) Assistance for relocation.

If an eligible protected employee relocates in order to obtain other employment, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss

incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence.

(d) Duty to hire protected employees

(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978, shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this Appendix prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 1371 of this Appendix. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employe in finding other

employment. Any individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

(e) Period of monthly assistance payments

(1) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been deprived of employment shall be made each month until the recipient obtains other employment, or until the end of the 72 months occurring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 72 months, so long as the total number of monthly assistance payments made under this section for any reason do not exceed 72.

(f) Rules and regulations

(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978.

(3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(g) Airline employees protective account

All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There are authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carrying out the provisions of this section.

(h) Definitions

For the purposes of this section –

(1) The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this Appendix. Such term shall not include any members of the board of directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 1371 of this Appendix, occurring during the first 10 complete calendar years occurring after October 24, 1978, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 7½ percent may be found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in which such particular reduction occurs the total reduction will exceed 7½ percent. In computing a 7½-percent reduction under this paragraph, the Board shall not include employees who are deprived of employment because of a strike or who are terminated for cause.

(i) Transfer of authority of Board

The authority of the Board under this section is transferred to the Department of Transportation on January 1, 1985.

(j) Termination

The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section.

(Pub. L. 95-504, § 43, Oct. 24, 1978, 92 Stat. 1750.)

REFERENCES IN TEXT

The Airline Deregulation Act of 1978, referred to in subsec. (h)(2), is Pub. L. 95-504, Oct. 24, 1978, 92 Stat. 1705, as amended. For compiete classification of this Act

to the Code, see Short Title of 1978 Amendment note set out under Section 1301 of this Appendix and Tables.

CODIFICATION

Section was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958 which comprises this chapter.

TRANSFER OF FUNCTIONS

All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by section 1551 of this Appendix, effective in part on Dec. 31, 1981, in part on Jan. 1, 1983, and in part on Jan. 1, 1985.

For transfer of certain enforcement functions of the Secretary or other official of the Department of Transportation relating to compliance with this chapter and the authorizations and regulations issued thereunder to the Federal Inspector, Office of Federal Inspector of the Alaska Natural Gas Transportation System, see Transfer of Functions note set out under section 1301 of this Appendix.

REGULATIONS

Part 220 – AIRLINE EMPLOYEE PROTECTION PROGRAM

Subpart A – Purpose and Scope of the Airline Employee Protection Program

Sec.

220.01 Definitions.

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Appendix I – U.S. Carriers certificated as of October 23, 1978 under Section 401 of the Federal Aviation Act of 1958, as amended.

Authority: Section 43(f) of the Airline Deregulation Act of 1978, Pub L. No. 95-504, 92 Stat. 1750-1753 (49 U.S.C. 1552).

(Secretary's Order No. 1-79, 44 FR 13093)

Subpart A – Purpose and Scope of the Airline Employee Protection Program

§ 220.01 Definitions.

As used in this Part, unless the content otherwise indicates:

(a) "Act" means the Airline Deregulation Act of 1978, Public law 95-504, 92 Stat. 1705.

(b) "Air Carrier" means an air carrier certificated under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371).

(c) "Center" means the entity or location which from time to time may be designated by the Secretary to receive, maintain and distribute the job listing information required by this Part.

(d) "Corporate officer" means an individual who holds any officer's position established pursuant to the Articles of Incorporation or bylaws of any air carrier, or who is otherwise identified as an officer by any air carrier, in filings with the Federal Aviation Administration, Civil Aeronautics Board or Securities and Exchange Commission or in any reports to stockholders or any public communications of an air carrier.

(e) "Covered air carrier" means an air carrier which was certificated prior to October 24, 1978 (A listing of such carriers appears as an appendix to these regulations).

(f) "Designated employee" means a protected employee who meets the eligibility requirements set forth in Section 220.10.

(g) "Effective period" means the period commencing on the effective date of these regulations and ending on the later of: (1) October 23, 1988, or (2) the last day of the final month in which the Secretary is required to make a payment under Section 43 of the Act; except that nothing in these regulations shall preclude the exercise of statutory rights and duties between October 24, 1978, and the effective date of these regulations.

(h) "Eligibility period" means the ten-year period beginning on October 24, 1978.

(i) "Employment relationship" means an attachment to a covered air carrier which includes, but is not limited to, compensated service, furlough, leave, or strike.

(j) "Equal employment opportunity requirement" means a specific equal employment requirement, pursuant to a federal court or administrative order, consent decree, or conciliation agreement, requiring that named individuals or specific members of a class are entitled to relief by virtue of the carrier's unlawful employment discrimination.

(k) "Occupational specialty" means the class, craft, or field of endeavor in which an individual was employed at the time of separation from a covered air carrier or in which the employee was employed during the 12 months immediately preceding the date of separation.

(l) "Protected employee" means a person other than a member of the Board of Directors or corporate officer of a covered air carrier:

(1) Who had an employment relationship with a covered air carrier on October 24, 1978, and

(2) Who on October 24, 1978, had four years of employment or four years accrued seniority with a single covered air carrier. The term employee shall include any full or part-time employee other than an employee in seasonal or temporary employment as defined herein. As used herein four years of employment shall mean not less than 48 months (whether or not consecutive) in which the employee actually completed the minimum number of

hours of regular employment required for such employee's craft, class or position under the then applicable requirements of the employing carrier.

(m) "Seasonal employment" means employment during limited periods of the year due to peak market conditions or other factors which are periodic in nature, and in positions which do not confer seniority or recall rights.

(n) "Secretary" means the Secretary of Labor of the United States.

(o) "Temporary employment" means employment of limited duration which does not confer seniority or recall rights.

(p) "Terminated," means, unless expressly provided to the contrary, termination of employment, other than for cause.

(q) "Terminated for cause" means the separation of an individual from employment initiated by an air carrier for violation of such carrier's rules, policies, procedures, or practices pertaining to employee standards of conduct, job performance, or dependability.

(r) "Vacancy" means an employment opportunity other than seasonal or temporary employment, which an air carrier seeks to fill from outside its existing or furloughed work force.

§ 220.02 Purpose

Section 43(d) of the Act provides a first-right-of-hire for designated employees of covered air carriers. The

regulations in this Part are issued to effectuate section 43(d)(1) and (2) of the Act (hereinafter referred to as the Rehire Program).

§ 220.03 Scope.

(a) The Rehire Program is applicable only to designated employees, as more fully set forth herein, and only those employees who are expressly granted a hiring preference under the Act and these regulations have any rights under the Rehire Program. The Secretary of Labor will also publish a comprehensive list of jobs available with air carriers.

§ 220.04 Responsibilities of the Secretary of Labor.

The Secretary of Labor is responsible for administering the Rehire Program, and the Assistant Secretary for Labor-Management Relations, Labor-Management Services administration (LMSA), has been delegated responsibility for the following:

(a) The development and promulgation of policies, regulations and procedures covering the first-right-of-hire provisions of section 43(d)(1) of the Act;

(b) The development and promulgation of policies, regulations, and procedures covering the comprehensive job list required under Section 43(d)(2) of the Act; and

(c) The establishment and implementation of reporting requirements for air carriers to obtain pertinent information necessary for fulfilling the Secretary's responsibilities under Section 43(d)(2) of the Act.

Subpart B – Designated Employees' Eligibility and Rights

§ 220.10 Eligibility requirements.

(a) To qualify as a designated employee eligible for rights under this Part 220, an applicant must be a protected employee who is involuntarily placed on furlough or is terminated by a covered air carrier during the eligibility period.

(b) A protected employee shall not be deemed to be furloughed or terminated if such employee:

(1) Retired voluntarily;

(2) Was required to retire by virtue of reaching the mandatory retirement age, if any, established by a covered air carrier or as prescribed by any government agency with regulatory authority over a covered air carrier;

(3) Retired due to a disability;

(4) Is on strike or is withholding services in support of other Employees who have struck the covered air carrier;

(5) Is terminated for cause as defined in § 220.01;

(6) Resigned or voluntarily quit for any reason.

(c) A designated employee who is recalled by his former carrier is no longer eligible under this section to exercise the first-right-of-hire. Such a person may become a designated employee in the future due to a subsequent termination or furlough which occurs on or prior to the expiration of the eligibility period.

§ 220.11 Designated employees' rights.

(a) A designated employee shall have a first-right-of-hire in such employee's occupational speciality, regardless of age, with any covered air carrier hiring additional employees; *Provided however,* That each designated employee must satisfy all qualifications or other requirements established by the hiring carrier (subject to the limitations contained in Section 220-21) and must make a timely application in accordance with normal carrier procedures for any particular job vacancy.

(b) A designated employee hired by any covered air carrier pursuant to the provisions of the Act shall not be required, as a condition of employment, or in any other manner, to relinquish, waive, or forfeit any seniority or recall rights which such person may possess with any other air carrier; *Provided, however,* That the provisions of this part shall not be deemed to create or prolong any such seniority or recall rights.

Subpart C – Carriers' Responsibilities

§ 220.21 Duty to hire.

(a) Subject to § 220.24, a covered air carrier shall have the duty to hire a designated employee, regardless of age, who otherwise meets the qualification requirements established by such carrier before it hires any other applicant when such carrier is seeking to fill a vacancy in the designated employee's occupational specialty from outside its work force. As used herein "work force" shall include all present employees and any furloughed or terminated employees who, at the time of furlough or termination, possessed recall or seniority rights.

(b) Subject to the provisions of § 220.24, a covered air carrier shall not fill a vacancy, which would otherwise be available to a designated employee, by promoting or reassigning a seasonal or temporary employee, *unless* such seasonal or temporary employee is a designated employee.

(c) When considering applications from more than one designated employee for a particular vacancy, a covered air carrier shall be entitled to offer employment to any such designated employee in its absolute discretion.

§ 220.21 Criteria for Employment.

(a) A covered air carrier shall be entitled to apply any prerequisites or qualifications determined by it for any vacancy, except that, solely with respect to the duty to hire created by the Act, a covered air carrier shall not be entitled to limit employment opportunities for designated employees on the basis of:

(1) Initial hiring age (provided that such prohibition shall not be applicable to retirement ages applicable to all of any class or craft of such air carrier's employees); or

(2) The existence of any seniority, recall rights or previous experience with any other air carrier; *Provided, however,* That covered air carriers shall be entitled to require prospective employees to disclose the existence of any such seniority or recall rights in making application for employment and to take the existence or nonexistence of such rights into account in selecting from among those qualified designated employees who have applied for a particular job vacancy.

(b) In filling job vacancies during the effective period, covered air carriers shall be entitled to require applicants to furnish evidence that they are designated employees.

§ 220.22 Listing a vacancy.

(a) During the effective period all air carriers shall be required to list each vacancy with the Center at the earliest practicable time, and to include with such listing a statement as to whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filing the vacancy. In addition, any air carrier shall be entitled to list anticipated vacancies with the center at any time.

§ 220.23 Content of vacancy listing.

Air carriers shall provide the Center with a description for each job listing, which shall include, but need not be limited to, the following –

(a) Job title;

(b) Type of position (full or part-time);

(c) Salary;

(d) Basic qualifications and/or training requirements;

(e) Brief description of duties;

(f) Location of vacancy (if known);

(g) Special requirements such as type rating, licensing, skill requirements, etc.;

(h) Whether the vacancy is subject to the duty to hire;

(i) Information on how to apply, such as contact person, mailing address, and any special application procedures; and

(j) Whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy.

§ 220.24 Filling a vacancy.

(a) A covered air carrier may fill a vacancy with a designated employee at any time after a vacancy has been listed with the Center.

(b) A covered air carrier may fill a vacancy with someone who is not a designated employee after the vacancy has been listed with the Center for at least 30 calendar days; if

(1) No designated employee with the requisite occupational specialty has applied for the vacancy in accordance with § 220.30 within that time;

(2) No designated employee who did apply within that time period meets the carriers' criteria for employment as set forth in § 220.21; or

(3) The vacancy is subject to an equal employment opportunity requirement and the carrier cannot satisfy such equal employment opportunity requirement by hiring a designated employee.

(c) A covered air carrier may fill a vacancy on a temporary basis with someone who is not a designated

employee while the carrier is considering applications for the vacancy which were received from designated employees during the listing period.

(d) The date of the listing shall be the date on which the listing is received by the Center.

§ 220.25 List of protected employees.

(a) Within 60 calendar days of the effective date of these regulations, each covered air carrier shall provide the secretary with a list of all protected employees who were employed by it on October 24, 1978.

(b) That list shall contain the following information:

(1) Protected employee's name;

(2) Social Security number (if available); and

(3) Current occupational specialty for present employees or occupational specialty at the time of separation from employment for former employees.

(c) Not later than 90 calendar days after the effective date of these regulations, each covered air carrier shall provide a onetime notice to each employee with an employment relationship with the carrier on October 24, 1978, stating whether or not the carrier has determined that employee to be a protected employee within the meaning of these regulations, and if so that the carrier has reported his or her name to the Secretary. Employees who are determined to be not protected shall be advised of their rights to appeal.

(2) Employees who dispute the carrier's determination of protected status may submit evidence of their

status to the covered air carrier within 60 calendar days of receiving the notice required by paragraph (c)(1).

(3) The covered air carrier shall consider the evidence submitted by the employee and shall inform the employee of its final determination within 15 calendar days of the submission of evidence. In the event the carrier determines that the employee qualifies as a protected employee, it shall forward the information required by paragraph (b) of this section to the Secretary.

§ 220.26 Appeals to the Secretary.

(a) If the employee disagrees with the carrier's final determination under § 220.25 that he or she is not a protected employee within the meaning of this part, the employee (or his or her designated representative with express authorization) may appeal such determination to the Secretary within 60 calendar days of the carrier's final decision under § 220.25(c)(3) or the date when such decision was required.

(b) An appeal must be written, dated, and signed by the employee. It must set forth:

(1) The full name, address, and telephone number of the employee;

(2) The full name and address of the carrier making the determination; the full name of the individual(s) who made the determination for the carrier and the date of that determination;

(3) A summary of the pertinent events and circumstances concerning the employee's status and the basis of the disagreement, including the original date of hire, date

of all periods of furlough, leave or termination, and copies of relevant documents; and

(4) Such other information as may be required by the Labor-Management Services Administration (LMSA).

(c) Any appeal hereunder may be filed with any office of the LMSA, (LMSA Area offices are listed as an appendix to these regulations). Upon receipt, an appeal will be forwarded to an LMSA Regional Office where the Regional Administrator will make a preliminary review of the appeal, and if warranted, request information from the parties or conduct such other investigation as may be required. If the matter cannot be resolved informally, the Regional Administrator will forward the file to the Secretary for review.

(d) If upon review of an appeal hereunder the Secretary determines that further action is not appropriate, he will so advise the parties. If upon review of the entire record the secretary determines that the employee qualifies for protected status, the Secretary will take appropriate steps to add the employee's name to the list of protected employees and will so notify the parties.

§ 220.27 Notice of Rights.

(a) Not later than the date of separation from employment, a covered air carrier which furloughs or terminates a protected employee during the eligibility period, unless such furlough is limited to a specific period of less than 90 calendar days, shall furnish such protected employee with a notice of rights in the form of a letter or other written documentation that such

employee is a designated employee and thereby is entitled to exercise a first-right-of-hire. Such notice of rights shall include, but not be limited to the following information:

(1) Name;

(2) Social Security number (if available);

(3) Occupational specialty;

(4) Date of furlough or termination;

(5) an official of the covered air carrier who can verify the individual's status as a designated employee; and

(6) Signature, name, and location of the certifying official.

(b) As soon as practicable, but not later than 60 calendar days following the effective date of these regulations, each covered air carrier shall make a reasonable effort to provide the notice of rights required in paragraph (a) of this section to any designated employee who was furloughed or terminated by such carrier on or after October 24, 1978, and prior to the effective date of these regulations and who has not been recalled to employment by such covered air carrier.

(c) A covered air carrier shall provide a verified true copy of the notice of rights to a designated employee who has lost his or her original copy.

§ 220.28 Air carrier actions to be reported to the Secretary.

(a) A covered air carrier shall report to the Secretary:

(1) The names and Social Security numbers (if available) of all designated employees hired by it, and

(2) The filling of any vacancy with other than a designated employee. With respect to any occurrences reported under paragraph (a)(2) of this section, the report of the covered air carrier shall contain the job number assigned to that vacancy by the Center, the date of hire, and a certification by a corporate officer that the carrier complied with the provisions of this part and that no qualified designated employee with the requisite occupational specialty applied in a timely manner.

(b) Two copies of the reports required by this section shall be filed with the Secretary covering the six-month periods ending June 30 and December 31 of each calendar year in which these regulations are in effect and shall be submitted within 60 calendar days of the end of the reporting period.

§ 220.29 Equal Employment Opportunity.

(a) Where a covered air carrier is under an equal employment opportunity requirement, the covered air carrier shall, to the extent possible, satisfy this equal employment obligation by hiring qualified designated employees.

(b) Where a covered air carrier is under an equal employment opportunity requirement and cannot satisfy

such requirement by hiring from the pool of qualified designated employees, the carrier may meet its equal employment requirement by hiring non-designated employees. *Provided, however,* That this provision shall not change or reduce the responsibilities of carriers in regard to the hiring procedures required by §§ 220.21, 220.22, 220.23, and 220.24.

Subpart D – Designated Employees' Responsibilities

§ 220.30 Designated employees; responsibilities.

It is the responsibility of each designated employee to:

(a) Make application to any covered air carrier for whom the designated employee desires to work in the time and manner required by such carrier.

(b) To insure that an application previously submitted to a covered air carrier which currently lists a vacancy is in an active status so as to be considered for such vacancy;

(c) To provide a copy, if requested, of the notice of rights to a potential employing air carrier, and

(d) to retain the original notice of rights for future use.

Subpart E – Department of Labor's Responsibilities

§ 220.40 Comprehensive job list.

(a) The Secretary shall establish a Center to maintain a comprehensive listing of all vacancies listed by air carriers in accordance with §§ 220.22 and 220.23.

(b) The Center will be accessible by telephone throughout the United States to facilitate the listing or modifying of vacancy information by air carriers.

(c) The Center shall provide an air carrier with an identifying number for each vacancy listed on the comprehensive listing.

(d) The comprehensive listing shall be compiled, published and distributed to each local office of the State Employment Security Agencies on a periodic basis as determined necessary by the Secretary, and it shall be distributed to such other individuals or organizations as may desire to receive copies thereof in accordance with criteria established by the Secretary from time to time.

§ 220.41 List of protected employees.

The Secretary shall establish and publish a list of protected employees as reported by covered air carriers under § 220.25. A copy of this list shall be sent to all covered air carriers as soon as available.

Subpart F – Administration

§ 220.50 Effective period of the program.

(a) *Beginning date.* (1) The requirements set forth in this part shall be effective 60 legislative days from publication of these regulations (A legislative day is defined by the Act as a calendar day when both Houses of Congress are in session).

(2) The Department shall publish a notice in the Federal Register announcing the actual effective date.

(b) *Ending date.* This program and these regulations terminate on the last day of the effective period.

(c) Nothing in this Part shall affect the rights and duties of protected employees and covered air carriers under the Act prior to the effective date of this Part.

§ 220.51 Disclosure of information.

The Department of Labor shall make available to covered air carriers and to designated employees or their authorized representatives, all reports, certifications, or lists collected under this Part, to the extent permitted by the Privacy Act (5 U.S.C. 552a) and the Department's regulations issued pursuant to that Act (29 CFR Part 70a).

Appendix I – U.S. Carriers Certificated as of October 23, 1978, Under Section 401 of the Federal Aviation Act of 1958, as amended

(Annotations Reflect Operating Status as of October 25, 1985).

1. Airlift International, Inc.
2. Air Micronesia, Inc.
3. Air Midwest
4. Air New England, Inc. (*1*)
5. Air Wisconsin, Inc.
6. Alaska Airlines, Inc.
7. Allegheny Airlines, Inc. (*2*)
8. Aloha Airlines, Inc.
9. American Airlines, Inc.
10. Aspen Airways, Inc.
11. Braniff Airways, Inc. (*1*)
12. Capitol International Airways, Inc. (*3*)
13. Chicago Helicopter Airways, Inc.*
14. Colonial Airlines, Inc. (*1*)
15. Continental Air Lines, Inc.
16. Delta Air Lines, Inc.
17. Eastern Airlines, Inc.
18. Evergreen International Airlines, Inc.
19. The Flying Tiger Line, Inc.
20. Frontier Airlines, Inc.
21. Hawaiian Airlines, Inc.
22. Hughes Air Corp.* (*4*)
23. Kodiak Western Alaska Airlines, Inc.
24. Mackey International Airlines, Inc.*

25. McCulloch International Airlines, Inc.
26. Midway Airlines, Inc.
27. Midway (Southwest) Airways Co.
28. Modern Airways, Inc. (*1*)
29. Munz Northern Airlines, Inc.
30. National Airlines, Inc.* (*5*)
31. New York Airways, Inc.*
32. North Central Airlines, Inc.* (*4*)
33. Northwest Airlines, Inc.
34. Overseas National Airways, Inc. (*6*)
35. Ozark Air Lines, Inc.
36. Pan American World Airways, Inc.
37. Piedmont Aviation, Inc.
38. Reeve Aleutian Airways, Inc.
39. Rich International Airlines, Inc.
40. Seaboard World Airways, Inc.* (*7*)
41. Southern Air Transport, Inc.
42. Southern Airways, Inc.* (*4*)
43. Texas International Airlines, Inc.
44. Trans International Airlines, Inc. (*8*)
45. Trans World Airlines, Inc.
46. United Airlines, Inc.
47. Western Air Lines, Inc.
48. Wein Air Alaska, Inc.

49. World Airways, Inc.

50. Wright Air Lines, Inc.

51. Zantop International Airlines, Inc.

* No longer holds certificate.

(1) Holds certificate, but not operating.

(2) Renamed U.S. Air, Inc.

(3) Renamed Capitol Air, Inc.

(4) Merged in to Republic Airlines, Inc.

(5) Merged into Pan American World Airways, Inc.

(6) Ceased operations in September 1978.

(7) Merged into Flying Tiger Line, Inc.

(8) Renamed Transamerica Airlines, Inc.

LEGISLATIVE MATERIAL

Senate Report No. 631, 95th Cong., 2d Sess., 113-17 (1978)

[Senate Report at 113]

The Committee believes that enactment of this regulatory reform bill will increase the total number of jobs in the airline industry. The purpose of the bill is to create a more competitive environment through an easing of entry restrictions and increase in pricing flexibility. Because the elasticity of demand for airline service is relatively high in many markets, the lower fares inherent in a more competitive industry should lead to an increase in the number of airline passengers. This increase, as well as the greater number of competitors that would result from less restricted market entry, should lead to additional

airline flights. More passengers and flights would necessarily entail expanded overall employment opportunities.

Nevertheless, it is true that after enactment of this bill the airlines for the first time will be principally responsible to market forces rather than government regulation. Airlines will undoubtedly differ in their ability to succeed in the new market oriented environment. The Committee does not believe that this difference in competitive ability will cause system contractions, but rather different levels of growth. There is certainly a possibility, however, that one or more airlines will encounter such difficulties in adjusting that they will lose enough traffic to cause a major reduction in their total labor force.

The theoretical possibility that a major reduction might occur in the labor force of one or more airlines is the primary source for the serious concern expressed about this bill by many airline employees and their labor representatives. The Committee felt that this concern should not be ignored and that careful consideration of the question of employee protection programs was warranted. The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past.

The fundamental reason why this regulatory reform bill should include an employee protection program is that for 40 years the U.S. airline industry has been regulated in all of its most economically significant aspects, including entry, exit, and pricing. This regulation has

protected from competition the fares and routes of certificated airlines, thus protecting their traffic and revenue as well. An airline's traffic and revenue is of course the key to its economic well-being – and its need for and ability to pay employees. Regulation has, therefore, had the effect of reducing the potential for major employment reductions in individuals airlines (at the same time, however, reducing potential increases not only in each airline but in the industry as a whole).

An additional aspect of the regulatory system which has had protectionist value to employees has been that certificates have become extremely valuable as a result of entry restrictions. Because of the value of their certificates, airlines in serious financial difficulty have without exception been able to merge with stronger airlines, thereby avoiding bankruptcy or substantial system contraction. A statutory condition for merger has been CAB approved. Such approval has been forthcoming only if the merger agreement contained a satisfactory program for employee protection.

[Senate Report at 114]

Airline employees have relied on the present regulatory system through their reliance on the conditions which have resulted from that system. They have relied directly in their decision to enter the industry and indirectly through their acceptance of compensation and work rules which have been negotiated within the context of the regulatory system and the job security it was thought to offer.

A crucial element of the present bill is the gradual phasing in of its key provisions. The Committee accepted without controversy the principle that a transition period should be provided to airline companies in order to allow them time for adjustment before the full force of the new regulatory system is felt. However, an individual employee will be able to do little to adjust to the new structure. Many airline employees have given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be able to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.

As already stated, the Committee has determined that the public interest will be best served by a more competitive system in which airline management has greater discretion with respect to routes and prices. Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority – the airline employees and their families who have relied on the present system.

Critics of the employee protection program argue that airline employees are no more deserving of protection against dislocations resulting from regulatory reform than employees in any other area of private industry who may be harmed as a result of Government actions (such as cancellation of a Government contract or establishment of pollution or occupational safety standards) that have adverse effects on their employers. The Committee disagrees. The air transportation industry is one of the few industries in the United States which is so comprehensively regulated, and thus immune from normal market forces. It is because of the past decisions of Congress to require such regulation that the present air transportation system has developed as it has. In order to conduct their operations, the airline companies had no choice but to comply with these regulations. This forced compliance led to a justifiable reliance on the stability of the regulatory structure. The Committee believes that Congress, having acted to prevent the normal free market evolution of the industry, now has a duty to the industry and its employees which would not exist if such action had not been taken. In order for Congress responsibly to change its policy now and require the industry to move toward a much more competitive market oriented environment, Congress should attempt to minimize the dislocations caused by the change. The change in policy and the temporary dislocations it may cause would not be **[Senate Report at 115]** necessary if Congress had not left in place so long a regulatory framework designed for the conditions that existed in the 1930's.

These considerations do not apply when a Government contract is cancelled or when Congress changes the

general legal background of competitive industries, such as by enacting new pollution standards. No company can reasonably rely on the renewal of a Government contract any more than it could rely on the renewal of a contract with a private buyer. Cancellation of a contract by Government or any other economic entity imposes no special responsibilities or duties outside the dictates of applicable contract law. A company is not required to enter into Government contracts. Similarly, a company cannot reasonably assume that the general legal environment within which it must do business will not change, and certainly not that all the physically damaging effects of a business on the persons and property of others will not eventually be restricted by statute.

Another concern expressed to the Committee is the fear that its employee protection program would set an unfavorable precedent for future legislation. The Committee believes that an employee protection program is justified only in very special circumstances. As indicated, the Committee concluded that the particular features of the airline industry and the regulated environment in which it has existed since 1938 make a temporary transitional assistance program appropriate. The appropriateness of such programs for future regulatory reform legislation must be examined on a case by case basis.

The Committee believes that the increased vitality of the airline industry, with the accompanying increased employment opportunities, that will result from enactment of this bill will alleviate a good deal of anxiety and opposition to similar regulatory reform efforts in the future.

The alternatives are clear: continued regulation and thus a continuing economic loss to the public, versus decreased regulation and, therefore, decreased loss to the public, potentially paid for by a temporary assistance program.

Features of the employee protection program

The employee protection program fashioned by the committee limits as much as possible the potential expenditure of Government funds, while providing a comprehensive program of protection for dislocated employees.

In order to be eligible for assistance an employee must have at least 4 years full-time experience with a certificated airline as of the date of enactment. These protected employees would then be eligible for monetary compensation in the event of job loss, relocation, or reduction in wages suffered in connection with a bankruptcy or "major contraction" of their employer which occurred within the first 10 years of enactment and which was in major part caused by the change in the regulatory structure brought about by the act as determined by the Board.

The requirement for 4 years experience is included because the committee believes that employees with 3 years or less seniority have not relied to a substantial enough degree on the present system to warrant protection. They have made less of a commitment to a particular airline and would suffer fewer difficulties and hardships in shifting to new employment.

[Senate Report at 116]

The 10-year period was selected because it is during such period that the airlines will be making most of their adjustments to the new system. Carriers will be rationalizing their route structures and establishing fares for the first time in an environment relatively unfettered by regulatory constraints. Because of the particular transitional provisions in the bill (for example, some automatic entry protection phases out in 3 years, the remainder in 5 years, and section 406 subsidy will phase out in 7 years), by the end of the 10-year period the carriers' competitive capabilities will have been tested and the success or failures of adjustments to the new climate demonstrated.

A "major contraction" is defined as a reduction by at least 15 percent of the total number of full-time employees of the employing carrier occurring within a 12-month period. Strike-related reductions will not be counted for this purpose. The 15-percent figure was chosen as the lowest figure consistent with the desire to avoid CAB determinations of causality with respect to dislocations caused by normal economic fluctuations. In the last 20 years, there have been only a few non-strike-related instances when the 15-percent level has been exceeded. The 15-percent test was chosen not only in order to reduce the number of CAB investigations, but also because the committee felt that assistance should only be made available if the employing carrier were in major financial difficulty. Otherwise, the protection offered in the collective bargaining agreement should be relied upon. Any particular reduction of less than 15 percent would, nevertheless, constitute a major contraction if the

Board determined that other reductions were likely to occur such that the test would be satisfied. This provision is intended to give displaced workers in clear cases the ability to receive assistance without their having to wait a full year before becoming eligible.

Under the program, each regulated air carrier is required to give priority hiring to displaced employees who satisfy the eligibility requirement as described above. Thus, few such employees would be without work for a long period of time. In addition if compensation payments began, the Secretary of Labor would be required to periodically publish a list of available jobs in aeronautics and related industries. Employees receiving compensation payments would be required to accept "reasonably comparable" employment or else lose a portion of their benefits, except that if the new job required relocation, the employee could elect not to relocate but would receive benefits for a shorter period. The provisions are intended to place on the employees the reasonable requirement of seeking and accepting available employment while still providing assistance where necessary. The interaction of these provisions will decrease the cash payments required under the program.

Eligible employees who list their jobs would be entitled to monthly assistance payments for a maximum of 3 years or until they were reemployed, whichever occurred first. The amount of such payment would be equal to a percentage of former wages, as determined by regulations promulgated by the Department of Labor. These regulations will be subject to congressional review. The committee considered setting statutory percentage figures and maximum dollar amounts, but concluded that

the Secretary of Labor, after consultation with the Secretary of Transportation, will be in a better position to determine **[Senate Report at 117]** the appropriate amounts. The committee intends that the percentages chosen will result in compensation payments that are less than the employees' after-tax income in order to preserve maximum incentives for employees to secure comparable work.

An eligible employee suffering a reduction in wages, would be entitled to receive a percentage of the decrease in wages, as set forth in regulations of the Department of Labor, determined pursuant to the preceding paragraph. Again, the maximum payment period is 3 years, except that the total number of monthly assistance payments – the payments for unemployment together with the payments for reduced wages – could not exceed 36. An eligible employee required to relocate would be entitled to reasonable moving and living expenses as well as compensation for any loss incurred on the sale of a residence, cancellation of a contract to purchase a residence, or cancellation of such employee's lease.

* * *

Supreme Court, U.S.
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No. 95-1643

In The

Supreme Court of the United States

October Term, 1995

CRIST ELLIS AND NORMA WONG-LARKIN,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant a petition for certiorari to review the Tenth Circuit's conclusion that the disparate impact theory of liability is not available under the Age Discrimination in Employment Act when that decision conforms with this Court's prior rulings and the decisions of other circuit courts.

2. Whether this Court should grant a petition for certiorari to decide whether the Tenth Circuit's conclusion that United's use of weight standards for flight attendant applicants did not violate the purposes of the Airline Deregulation Act is erroneous.

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STATEMENT OF THE CASE

A. Factual background.

Petitioners Crist Ellis and Norma Wong-Larkin (herein "Petitioners") are former Frontier Airlines flight attendants who applied to work for Respondent United Air Lines, Inc. ("United") following Frontier's declaration of bankruptcy. At that time, United required all flight attendant applicants to meet certain weight guidelines, based upon the applicant's height. United also maintained a height/weight chart for existing employees which contained variances based upon the age of the flight attendant employee. Although the Petition attempts to make controversial the fact that United utilized two different weight charts, it was undisputed below that United implemented the employee chart as a result of collective bargaining between the Company and the flight attendant union. Petitioners' Appendix, p. 18a.

Petitioners did not meet United's height/weight requirements for flight attendant applicants when they applied. *Id.*, p. 15a. As a result, Petitioners were not offered positions as flight attendants.

At the time they applied, Petitioners were protected employees under the Airline Deregulation Act ("ADA"), 49 U.S.C. app. § 1552 (1988) (codified as amended at 49 U.S.C. § 42101 *et seq.* (West 1994)). Section 43(d) of the ADA grants preferential hiring treatment by covered air carriers to protected employees who lost their jobs as a direct result of the deregulation of the airline industry. 49

U.S.C. app. § 1552(d).[1] Before an employee will be entitled to such preferential treatment, however, the employee must meet the air carrier's noncompetitive hiring prerequisites. 29 C.F.R. § 220.21(a). Because Petitioners did not meet United's height/weight qualifications for flight attendant applicants, Petitioners were not given preferential hiring treatment.

B. Procedural history.

After United rejected their applications, Petitioners filed a lawsuit claiming that United's failure to hire them violated both the ADA and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The district court entered summary judgment against Petitioners on both claims.[2] Assuming without deciding that a disparate impact claim was cognizable, the district court nevertheless found that Petitioners failed to state a

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[1] United is one of the air carriers covered by § 43 of the Airline Deregulation Act. 29 C.F.R. § 220, App. I.

[2] In their Brief opposing United's Motion for Summary Judgment, Petitioners argued both the disparate impact and disparate treatment theories of discrimination. However, at a hearing on the merits of United's Motion, the district court concluded that Petitioners abandoned their disparate treatment claim. Petitioners' Appendix, p. 35a. Thus, the district court only addressed Petitioners' ADEA claim under a disparate impact theory of liability. *Id.* On appeal, the Tenth Circuit disagreed with the district court's assessment that Petitioners intended to proceed only under the disparate impact theory of liability. *Id.*, p. 12a. Nevertheless, as set forth below, the Tenth Circuit found that Petitioners offered insufficient evidence to support the disparate treatment claim as a matter of law. *Id.*, pp. 14a-16a.

claim of age discrimination for three reasons: (a) Petitioners had no claim of disparate impact since Petitioners themselves admitted that they were capable of meeting United's weight requirements; (b) Petitioners failed to state a claim for disparate impact because they offered no evidence from which a fact finder could conclude that increasing weight has a correlation to advancing age; and (c) United offered evidence of a legitimate business justification for its decision to relax the height/weight standards for incumbent employees which Petitioners failed to show was a pretext for age discrimination. *Id.*, pp. 39a-41a.

On appeal, the Tenth Circuit affirmed the district court's decision. Addressing the ADEA claim, the Tenth Circuit first considered the disparate treatment theory. The court held that Petitioners failed to establish a *prima facie* case of disparate treatment because Petitioners failed to show that they were qualified for flight attendant positions at United, since they did not meet United's weight requirements for new hires and, in any event, failed to demonstrate that these weight requirements were a pretext to exclude older applicants.[3] *Id.*, pp. 14a-16a. The Tenth Circuit then concluded that Petitioners could not pursue their age discrimination claim under the disparate impact theory, on grounds that the disparate impact theory is not a cognizable theory of liability under the ADEA. *Id.*, p. 19a. Because the Tenth Circuit rejected

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[3] Petitioners have not sought review of the Tenth Circuit's conclusion that Petitioners failed to establish a genuine issue of fact as to whether United intentionally discriminated against them on the basis of their age.

the viability of this theory in the first instance, the Tenth Circuit did not reach the district court's findings on the merits of Petitioners' ADEA claim.

The Tenth Circuit also affirmed the district court's dismissal of Petitioners' ADA claim, concluding that United was entitled under the Act to apply *"any* prerequisites or qualifications determined by it" to designated employees, other than initial hiring age, so long as the qualifications do not defeat the purpose of the Act. *Id.*, pp. 28a-29a. (emphasis in original) (citations omitted). Because Petitioners failed to demonstrate that United's weight standards frustrated the purpose of the Act or were otherwise impermissible, the Tenth Circuit held that dismissal was appropriate. *Id.*, p. 29a.

REASONS FOR DENYING WRIT

I. CERTIORARI AS TO THE AVAILABILITY OF THE DISPARATE IMPACT THEORY OF LIABILITY UNDER THE ADEA SHOULD NOT BE GRANTED BECAUSE THE TENTH CIRCUIT'S DECISION CONFORMS WITH THIS COURT'S PRIOR RULINGS AND THE DECISIONS OF OTHER CIRCUITS.

A. The Tenth Circuit's Decision that a Disparate Impact Claim is Unavailable Under the ADEA is a Correct Decision Which is Consistent with this Court's Decisions and the Decisions of Other Courts.

Petitioners ask this Court to grant the Petition for Certiorari to determine whether the disparate impact theory should be available as an alternative means of proving discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. The primary thrust of Petitioners' argument is their contention that "[i]ntervention is necessary to resolve a split in the circuits." Petition, p. 4. In fact, Petitioners have labored to create the appearance of a conflict among the circuit courts on an issue in which no clear conflict exists.

Congress enacted the ADEA in 1967 in response to a Report commissioned from the Secretary of Labor, entitled "The Older American Worker: Age Discrimination in Employment" (1965). That Report identified two kinds of age discrimination – "arbitrary discrimination" or intentional discrimination against older workers, and problems resulting from factors which merely "affect older workers more strongly, as a group, than they do younger employees." *Id.*, at pp. 5, 11. The stated purpose of the

ADEA, as set forth in 29 U.S.C. § 621(b), is to "prohibit *arbitrary* age discrimination in employment." (emphasis added). Thus, in enacting the age discrimination statute, Congress indicated its intent to focus upon intentional age discrimination in the workplace.

In 1993, this Court issued its unanimous opinion in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), in which the Court articulated the standard for claims of age discrimination:

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . . When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . .

123 L. Ed. 2d at 347. Alluding to the Report which preceded the Act, the opinion confirmed the specific problems that the ADEA was enacted to redress: "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* Although this Court limited its holding to the disparate treatment theory before it, the decision clarified the kind of evidence which will support a claim of age discrimination.

In the wake of *Hazen Paper*, few courts have had the opportunity to address directly the viability of the disparate impact theory under the ADEA. Nevertheless, those courts which have faced the issue squarely have unanimously agreed that a disparate impact claim is *not* available to prove age discrimination. *DiBiase v. SmithKlein Beecham Corp.*, 48 F.3d 719 (3rd Cir. 1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 132 L. Ed. 2d 828 (1995); *Martincic v. Urban Redevelopment Authority*, 844 F. Supp. 1073, 1077-78 (W.D. Pa. 1994). The Tenth Circuit's decision in this case that disparate impact cannot be used to state a claim under the ADEA is clearly aligned with these recent decisions.

Petitioners' claim that the Tenth Circuit reached its decision by misconstruing *DiBiase* and the Sixth Circuit's opinion in *Lyon v. Ohio Educ. Association and Professional Staff*, 53 F.3d 135 (6th Cir. 1995), is without merit. Petitioners have attempted to create a conflict between the Tenth Circuit's opinion in this case and the holdings in *DiBiase* and *Lyon* which does not exist. Petitioners first claim that the Tenth Circuit erroneously interpreted *DiBiase* because that court never reached the disparate impact issue. Petition, p. 5. In fact, Judge Greenberg, writing for the plurality, states, "[m]oreover, in the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA." 48 F.3d at 732. The Sixth Circuit in *Lyon* likewise concluded, "There is considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory. . . . " 53 F.3d at 139 n.5. Thus, Petitioners' claim that the *Lyon* court's opinion was directly contrary to the Tenth Circuit's holding is inaccurate.

Indeed, even in those circuits in which the disparate impact theory may remain viable, courts have expressed considerable doubt as to whether the theory would be sanctioned if expressly challenged. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (DeMoss, J., concurring and dissenting) (concluding that the disparate impact theory is not available under the ADEA in the wake of *Hazen Paper*); *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1474 (9th Cir. 1995) (indicating reservation as to whether disparate impact should apply to ADEA claim, but failing to reach issue because jury found existence of disparate treatment); *Graffam v. Scott Paper Co.*, 1995 U.S. App. Lexis 17120 (1st Cir. July 14, 1995), at *8 (questioning the viability of disparate impact claim under ADEA in light of *Hazen Paper*, but assuming its applicability). Petitioners' citations to *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983), and *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984), as contrary decisions are not persuasive. All of these cases were decided before the *Hazen Paper* decision was announced.

The Tenth Circuit's construction of the ADEA is consistent with the Act's legislative history, this Court's precedent in *Hazen Paper Co. v. Biggins*, and the conclusions of other courts which have addressed the issue to date. In light of this consensus and the clear trend toward rejecting the disparate impact theory as a means of proving discrimination under the ADEA, this Court should decline to exercise its discretion to consider the issue.

B. This Case is not a Proper Vehicle for Resolving Issues Concerning the Viability of the Disparate Impact Theory Because Petitioners Failed to State a *Prima Facie* Claim in the Court Below.

It is the customary practice of this Court to refrain from accepting certiorari to consider an issue where a petitioner has failed to make a case that she is entitled to any relief on the merits. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 89 (1970). The thrust of the Petition is that a decision by this Court to reverse the Tenth Circuit would revive Petitioners' age discrimination claim. In fact, as set forth below, the district court has already reached the merits of Petitioners' disparate impact claim and found in United's favor. Thus, even if issues concerning the availability of a disparate impact claim under the ADEA warrant this Court's examination now, this case is not a proper vehicle to resolve that dispute.

The district court chose not to address the issue of whether a disparate impact theory was available in the first instance, but instead assumed its applicability and concluded that, applying that analysis, Petitioners could not withstand summary judgment on their ADEA claim. First, the district court found that Petitioners failed to offer *any* evidence of a correlation between advancing age and increasing weight. Petitioners' Appendix, p. 40a. To prove disparate impact, a plaintiff must offer evidence "of a kind and degree" sufficient to show that the practice does in fact disparately impact members of the protected group in order to meet her burden of proof. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). The

complete failure by Petitioners to offer such evidence below justified the district court's decision to dismiss Petitioners' disparate impact claim on the merits.

Alternatively, the district court found that Petitioners could not state a valid claim because both had testified that they could control their weight generally and could have met United's applicant height/weight requirements at all relevant times. Petitioners' Appendix, pp. 39a-40a. In reaching this conclusion, the district court relied upon *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), in which the Fifth Circuit held that there is no disparate impact if a requirement is one that the affected applicant can readily observe. *Id.*

Because Petitioners' disparate impact claim was addressed and found to be insufficient on the merits below, a decision by this Court will have little effect on the outcome of this case. This Court should reserve the opportunity to address the issues raised in the Petition for a case in which the petitioner is otherwise entitled to relief on the merits.

II. THIS COURT SHOULD NOT REVIEW THE STANDARD OF PROOF FOR A CLAIM BROUGHT UNDER THE AIRLINE DEREGULATION ACT IN THIS CASE BECAUSE: (1) OF THE NEED TO RECONSIDER FACTUAL FINDINGS; (2) THE ISSUE IS NOT IN DISPUTE AMONG THE CIRCUIT COURTS; AND (3) REVIEW BY THIS COURT WOULD HAVE LIMITED PRECEDENTIAL VALUE.

Petitioners ask this Court to grant certiorari to determine the proper burden of proof in an Airline Deregulation Act claim, contending that the Tenth Circuit erred in requiring them to prove that United's hiring prerequisites were pretextual and further charging, "[t]here were clearly factual issues in dispute" as to whether Petitioners demonstrated that United's applicant height/weight requirements frustrated the purpose of the ADA. Petition, p. 11. There are three principal reasons why this court should not grant certiorari to consider these issues – first, because the Petition requires the Court to review the factual determinations of the lower courts; second, because the Tenth Circuit's determination in this case is a proper interpretation of the ADA which is not in conflict with any other court decision; and finally, because any decision by this Court would have limited value, since the ADA by its very terms affects a finite number of individuals.

A. The Issues Presented by Petitioners Require the Court to Review Factual Determinations Made by Lower Courts.

The ADA does not mandate that an airline hire applicants protected by the statute who do not meet the air

carrier's noncompetitive hiring prerequisites. 29 U.S.C. § 220.21(a). In this case, neither Petitioner met United's weight requirements for applicants of their height. Petitioners' Appendix, p. 15a. Petitioners concede: "Weight requirements are permissible job-related criteria for flight attendants." Petition, p. 8. The Tenth Circuit found that: "Plaintiffs have also failed to introduce any evidence that the weight standards acted generally to frustrate the first hire rights of designated employees by preventing them from getting hired." Petitioners' Appendix, p. 29a.

Nevertheless, Petitioners claim that an air carrier cannot impose job criteria upon applicants which defeat the purpose of the ADA, and further contend that the Tenth Circuit erred in affirming the district court's decision to grant summary judgment as to this claim, stating: "In short, Petitioners produced evidence from which a reasonable fact-finder could have concluded that under the ADA United's height-weight requirement 'defeats the purpose of the Act' and was designed to deny 'protected employees' their first right of hire." Petition, p. 10.

This Court should not issue a writ of certiorari to determine the sufficiency of factual findings, especially when two courts have thoroughly reviewed the issue. This Court should not create a space in its docket to determine an issue which has little precedential value for lower courts.

B. The Tenth Circuit's Imposition of the Burden of Proof Upon Petitioners is a Correct Interpretation of the Statute Which Does Not Conflict with the Decisions of any Other Circuit Courts or this Court.

Petitioners argue that the Tenth Circuit imposed an erroneous burden upon them. Petition, p. 11. Yet, Petitioners cite to no precedent to support their proposition that the Tenth Circuit misconstrued the applicable standard of proof. Petitioners likewise point to no other decisions which would indicate a conflict between courts meriting this Court's attention. In fact, the lack of support for Petitioners' position is not surprising because the Tenth Circuit is the first circuit to address the issue directly, and its conclusions are consistent with the decisions reached by other courts who have analyzed the ADA.

The Tenth Circuit's construction of the standard of proof for a claim under the ADA is well-reasoned. The Tenth Circuit concluded that a plaintiff who seeks to invalidate an air carrier's noncompetitive employment requirement must demonstrate that the requirement frustrates the purpose of the Act by generally preventing designated employees from being hired. Petitioners' Appendix, p. 29a. The Tenth Circuit further concluded that, to the extent Petitioners contended that the height/weight requirements violated the statute by limiting the employment opportunities of designated employees on the basis of "initial hiring age", Petitioners bore the burden of proving that these requirements were a pretext for artificially maintaining younger entry-level hires. *Id.*, pp. 27a-28a.

The Tenth Circuit's decision is entirely consistent with the D.C. Circuit's opinion in *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), the only other court which has confronted this issue. There the D.C. Circuit was presented with circumstances substantially similar to the circumstances here. Crocker, a pilot who was entitled to first-hire rights, brought a claim against Piedmont after Piedmont refused to hire him based upon its policy against hiring any pilot whose license had been suspended by the Federal Aviation Administration. 49 F.3d at 738. Crocker claimed that Piedmont's real motivation for turning down his application was age, in contravention of the express provisions of the ADA. *Id.* Although reversing the entry of summary judgment, the D.C. Circuit indicated that Crocker, *not* Piedmont, bore the burden of proving that the reasons relied upon by Piedmont to reject his application were a pretext for limiting his opportunities on the basis of initial hiring age. *Id.* at 749-50.

Given the limited number of decisions addressing § 43(d) rights in general and the consistency found in those opinions which have confronted the issues raised by this Petition, Petitioners have not advanced any basis under S. Ct.R. 10 for this Court to issue a writ of certiorari.

C. A Decision to Grant Certiorari in this Matter Would Have Limited Precedential Value Because the ADA Covers a Finite Number of Individuals.

Congress enacted the Employee Protection Program of the Airline Deregulation Act to ease some of the problems expected as a result of deregulation of the airline industry. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 737 (D.C. Cir. 1995). Those provisions were designed to give certain airline employees who lost their jobs as a result of deregulation during a ten-year deregulatory period *temporary* hiring preferences and financial assistance. 42 U.S.C. App. § 1552(d).

Although protected employees under the ADA remain entitled to a hiring preference, the number of individuals who may take advantage of the hiring preference provided by the ADA is finite. The Act only applies to employees terminated under certain conditions prior to October 24, 1988. *Id.* In addition, the ADA is of limited duration.[4] This Court should not grant certiorari over an issue involving a statute which will affect a limited number of individuals in a single industry, particularly given the likelihood that a claim under the ADA could expire at any time.

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[4] In 1994, the ADA was amended and recodified at 49 U.S.C. § 42101 *et seq.* Although no specific date was identified, the Act does contain a sunset provision at which point the Act will cease to be enforceable. 49 U.S.C. § 42106.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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